TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 46

ARTHUR M. MANIGAULT, APPELLANT,

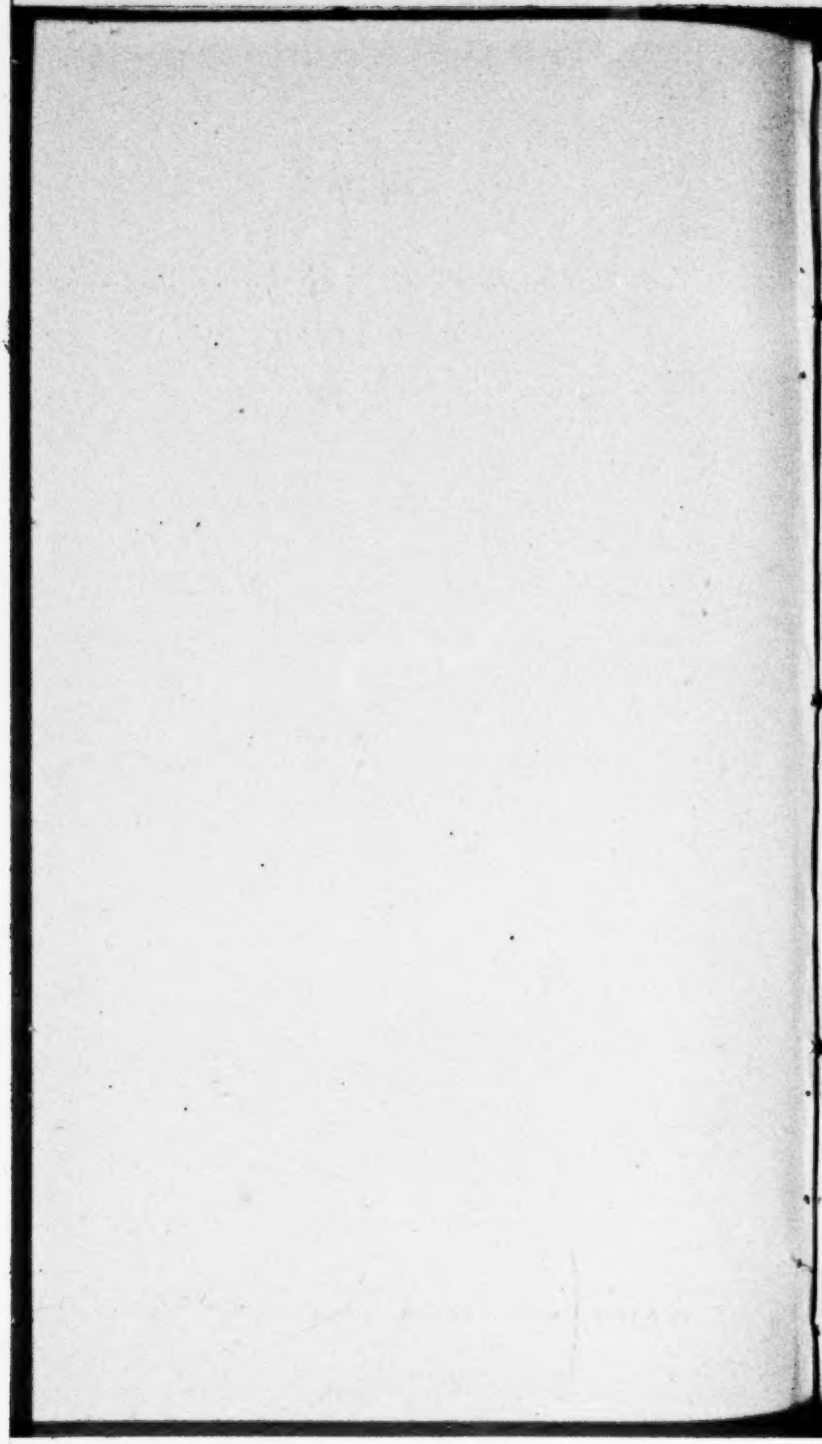
vs.

A. A. SPRINGS AND ST. J. M. LACHICOTTE, COPARTNERS IN BUSINESS UNDER THE FIRM NAME OF S. M. WARD & COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED JUNE 6, 1906.

(19,390.)



(19,390.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 290.

ARTHUR M. MANIGAULT, APPELLANT,

vs.

A. A. SPRINGS AND ST. J. M. LACHICOTTE, COPARTNERS IN BUSINESS UNDER THE FIRM NAME OF S. M. WARD & COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 16, 1905.

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1 TRANSCRIPT OF RECORD.

THE UNITED STATES OF AMERICA, District of South Carolina, } *To-wit:*

In the Circuit Court, Fourth Circuit. In Equity.

At a circuit court of the United States for the fourth circuit in and for the district aforesaid, on the first Tuesday in March, A. D. 1904, before the Honorable Charles H. Simonton, circuit judge of the United States for the fourth judicial circuit, holding said court according to the form of the act of Congress in such cases made and provided, among other were the following proceedings, to wit:

ARTHUR M. MANIGAULT, Complainant,
against
A. A. SPRINGS and ST. J. M. LACHICOTTE, Copartners in Business under the Firm Name of S. M. Ward & Co., Defendants.

Bill of Complaint.

2 Bill of Complaint.

Filed March 4, 1903.

UNITED STATES OF AMERICA, District of South Carolina.

In the Circuit Court. In Equity.

ARTHUR M. MANIGAULT, Complainant,
vs.
A. A. SPRINGS and ST. J. A. LACHICOTTE, Copartners in Business under the Firm Name of S. M. Ward & Co., Defendant-.

To the honorable the judges of the circuit court of the United States for the district of South Carolina:

Arthur M. Manigault of North Santee in Georgetown county, and a citizen of the State of South Carolina brings this his bill against A. A. Springs and St. J. M. Lachicotte, both of Georgetown county, in the State of South Carolina, and citizens of the said State of South Carolina, copartners in business under the firm name of S. M. Ward & Company, and thereupon your orator complains and says:

1. That this cause is a suit of a civil nature in equity where the matter in dispute exceeds, exclusive of interest and costs, the sum

of two thousand dollars, and arises under the Constitution and laws of the United States as hereinafter set forth.

II. That your orator is the owner in fee of a valuable rice plantation situate in Georgetown county on North Santee river
3 bordering partly on Minim creek, and lying in part just opposite the mouth or entrance of Kinloch creek in said county, and that your orator is further the owner in fee of a valuable mill site situate on the Santee river on the waters of Bluff Back creek, a branch of said Kinloch creek, as will more fully appear by the map or plan of the portions of said creeks with the lands adjacent thereto hereunto annexed as Exhibit "A."

III. That the said Kinloch creek is a navigable stream or water highway, and has always been capable of navigation by vessels therefrom into Santee river, and thence into the Atlantic ocean and to all parts of the United States or the world. That Kinloch creek is not only a navigable water-highway, but it connects at one point with the main State road or highway leading down from the upper portion of the State down Santee river, and that there is a public landing at the point at which Kinloch creek connects with said State road, so as to make a continuous highway from the same over the navigable waters of Kinloch creek to the main State road and thence to the upper country.

IV. That heretofore, to wit, in August 1898 this plaintiff was the owner of the said valuable lands lying opposite the mouth of Kinloch creek, and that F. W. Ford was the owner of certain rice lands bordering on Kinloch creek and lying at the upper end thereof. That at that time the said defendants hereto had erected a dam across Kinloch creek, which dam was an obstruction to the navigation thereof, and to the free ingress and egress of the waters therein and therefrom, and that your orator and the said F. W. Ford conceiving themselves injured and obstructed by said dam across said navigable creek both as to the injury to their planting lands, and the obstruction to the use of said creek—desired the same immediately removed by the said defendants herein as an injury and obstruction as aforesaid. That after long negotiation the said defendants herein in consideration of the deferring of the removal of said
4 obstruction then existing until 31st December 1898, entered into an agreement under seal, wherein and whereby it was agreed that said obstructions in said Kinloch creek, to wit, the dam across the same, should be by the said Arthur M. Manigault and F. W. Ford, their agents, servants or employees removed entirely after the 31st December 1898, and said creek should be kept open and free and clear from any obstruction, without any let, hindrance, objection or molestation whatsoever in act or procurance by the defendants hereto, their servants, agents or employees, as will appear by a copy of said deed so executed under seal, hereto annexed as Exhibit "B." That in accordance with the terms of said agreement said obstruction was allowed to remain across said Kinloch creek until 31st December 1898, when the same was thereafter removed

by the said A. M. Manigault and F. W. Ford, and has so continued removed ever since.

V. That thereafter and this agreement being of force and relied upon by your orator, your orator purchased a mill site on Santee river which had been formerly occupied as a rice mill, but which could be used for the purpose of a rice or of a saw mill, and one of the main elements in the value of which is that it has water connection with Bluff Back creek, but inasmuch as Bluff Back creek is accessible only through Kinloch creek, the value of said mill site by reason of its accessibility through Kinloch creek depends upon said Kinloch creek being kept open and unobstructed and any dam or obstruction in Kinloch creek will not only prevent your orator from access to the said public landing on the State road, if he so desires, from his plantation on Santee river through Kinloch creek, but will also prevent access to the rear of his mill site on Santee river through Bluff Back creek, and this will entirely destroy the availability of said site for a saw mill. That in addition thereto the erection of a dam across Kinloch creek, by preventing the inflow of the rising tide that passes from Santee river through Minim creek, and which would otherwise have access and overflow over the whole of Kinloch creek, and its branches will cause the water to fall back to some extent upon the banks of your orator on his plantation just opposite the mouth of Kinloch creek on Minim creek, so as to compel your orator to raise his banks to his great damage, much exceeding in all the sum of two thousand dollars.

VI. That the General Assembly of the State of South Carolina at its last session has just passed an act which has been approved by the governor, to authorize the said A. A. Springs and St. J. M. Lachicotte, defendants herein, to construct and maintain a dam across Kinloch creek, notwithstanding and in direct contravention of the deed and covenants under seal, entered into by the said defendants hereto in their agreement hereinbefore referred to, and annexed hereto as Exhibit "B." That the damming and closing of said Kinloch creek by said act is attempted to be authorized and permitted for the mere private purposes and for the greater financial improvement of the private agrocultural lands of said defendants hereto, and is not authorized or attempted to be authorized for the purposes of improving navigation or for any public use or purpose whatsoever. That a copy of the said act is hereto annexed as an exhibit, to wit, Exhibit "C," to this bill of complaint.

VII. That the enacting of the said law is the passing by the State of South Carolina of a law impairing the obligation of a contract by annulling or attempting to annul and avoid the contract and covenant entered into by the said defendants hereto in and by their said agreement hereinbefore referred to, and annexed as an exhibit, and is the passing of a law in contravention of the provisions of article 1, section 10 of the Constitution of the United States.

VIII. That at the time of the acquisition of the said properties

by your orator, to wit, both his plantation as aforesaid on
6 Minim creek, and also his mill site on Bluff Back creek, there was and still is a provision of the constitution of the State of South Carolina, to wit, section 28 of article I—"All navigable waters shall forever remain public highways free to the citizens of the State and the United States, without tax, impost, or toll imposed," and also section 1st article XIV of the constitution of South Carolina, that "All navigable waters within the limits of the State shall be common highways and forever free, as well to the inhabitants of this State as to the citizens of the United States," which right or privilege is part of the value of the lands and properties of your orator hereinbefore referred to; and that the damming of Kinloch creek, and its consequent closing as a navigable water highway is a destruction of part of the value of the said properties of your orator given to him at the time of his acquisition thereof by the constitution of the State of South Carolina, and the passage of the said act by the General Assembly of the State of South Carolina is an impairment of the obligation of the contract so entered into by your orator when he was permitted to acquire said properties, and is the taking of the property of your orator without compensation therefor, and is the depriving your orator of his property without due process of law in contravention of section I of article XIV of the amendments to the Constitution of the United States. That your orator as the owner of his said mill site abutting on Bluff Back creek, has as part of his private property the right of a riparian owner, to wit, the right of an unobstructed passage to and from his said property on and over the waters of Kinloch creek, and that it is provided by the constitution of South Carolina, in section 17, article I, that "Private property shall not be taken for private use without the consent of the owner nor for public use without just compensation being first made therefor."

And that the closing of Kinloch creek by the passage of the said act, and the loss of access thereby to his said mill site, and the consequent damage to the lands of your orator lying just oppo-
7 site and in immediate conjunction to the mouth of Kinloch creek, is the taking of the property of your orator without his consent, and without compensation therefor, in contravention of the provisions of section 10, article I of the Constitution of the United States, and of section 1st of article XIV of the amendments to the Constitution of the United States.

IX. That in and by section 34, article III of the constitution of South Carolina, it is declared that the General Assembly of the State of South Carolina shall not enact local or special laws concerning the following purpose among others, to wit, "to lay out, open, alter or work roads or highways" which provision is by section 29 of article I of said Constitution declared to be mandatory and your orator shows and alleges that the said act so attempted to be enacted by the General Assembly allowing Kinloch creek to be dammed as aforesaid, is a local and special law altering a highway, to wit, a

navigable stream and is therefore null and void as in contravention of said provision of the Constitution.

X. That in and by section 31, article III, chapter II of the Code of Laws of South Carolina 1902, it is declared that no bill for the granting of any privilege or immunity or for any other private purpose whatsoever shall be introduced or entertained in either house of the General Assembly except by petition to be signed by the person or persons seeking such privilege, immunity or other private grant or relief; and in and by section 34, of said article and chapter last above mentioned, it is further declared that in every case other than that of a charter or incorporation, the petition shall set forth fully and distinctly the merits and particulars of the case, and if the same shall in any wise affect the rights of others directly who reside in this State such petition shall be accompanied with proof that the parties who may be affected thereby have had sixty (60) days' notice of the presentation of such petition before such petition is presented and also that notice of the intention
8 of the petitioner or petitioners to make such application has been published in a newspaper having the largest circulation in the county where the privilege or immunity is to be enjoyed, once a week for at least three weeks, the first of which publication shall be at least sixty (60) days before such petition is presented. And your orator shows and alleges, that no petition signed by said defendants hereto, or by any one on their behalf, was ever presented to the General Assembly seeking the privilege of damming Kinloch creek as authorized and permitted in said act, nor was any notice of any such petition or of any intended application for such privilege ever given to your orator, although residing in this State and directly affected thereby, nor was any publication of any such petition, or intended application ever made in any newspaper published in Georgetown county. Wherefore, as your orator shows and alleges said act to permit the damming of Kinloch creek by the defendants having been attempted to be passed in direct contravention of the said provisions of law, is null and void.

XI. That the said A. A. Springs and St. J. M. Lachicotte, defendants herein, are as your orator is informed and believes and hereby so alleges and charges, on the point of immediately taking advantage of the alleged authority given by the said act of the legislature, and of erecting a permanent dam and obstruction across Kinloch creek, the erecting of which will be at once to put an end to your orator's use thereof, and to permanently injure and affect the value of his property irreparably and beyond the power of your orator to prevent, and to deprive your orator of his property as aforesaid.

XII. In consideration whereof, and forasmuch as your orator is remediless save in a court of equity, and to the end that the said defendants may if they can answer the charges and allegations of this bill of complaint (but nor under oath answer under oath
9 being hereby waived from each of them) as if the said defendants were hereto again specifically interrogated, your

orator prays that the said defendants, and each of them, and the servants, agents, and employees of them or either of them be each and all restrained and enjoined from in any wise damming, diking or obstructing or procuring to be dammed, diked or obstructed the said Kinloch creek or any part or branch thereof, and be also restrained and enjoined from in anywise interfering with or preventing your orator, his servants, agents or employees from opening and keeping open all and every part of the said creek, so as to free and clear the same from all or any obstructions without any let, hindrance, objection, delay or molestation whatsoever in act or procurance by the defendants herein, their servants, agents or employees and that in the meantime and until the final judgment and decree of this court, a restraining order be issued to the said defendants restraining them in the manner and form as hereinbefore prayed, and that your orator may have all such other and further relief as the nature of the case may require, or that equity can afford.

XIII. May it please your honors to grant unto your orator as well an injunction as above prayed for, as also a writ of subpœna to be issued out of this honorable court directed to the said A. A. Springs and St. J. M. Lachicotte, defendants herein, commanding them and each of them under a penalty to be therein named and upon a day to be therein fixed, to be and appear in this honorable court and answer the premises, and abide the further order and decree of this court herein.

And your orator will ever pray, &c.

MITCHELL & SMITH,
Solicitors for Complainant.

10 STATE OF SOUTH CAROLINA, }
Charleston County. }

Personally appeared Arthur M. Manigault, complainant above named and having been first duly sworn made oath that he hath read the foregoing bill of complaint and that the matters of fact therein stated are true so far as the same are stated of his own knowledge, and so far as the same are stated upon the information of others he believes the same to be true.

A. M. MANIGAULT.

Sworn to before me this 4th day of March, A. D. 1903.

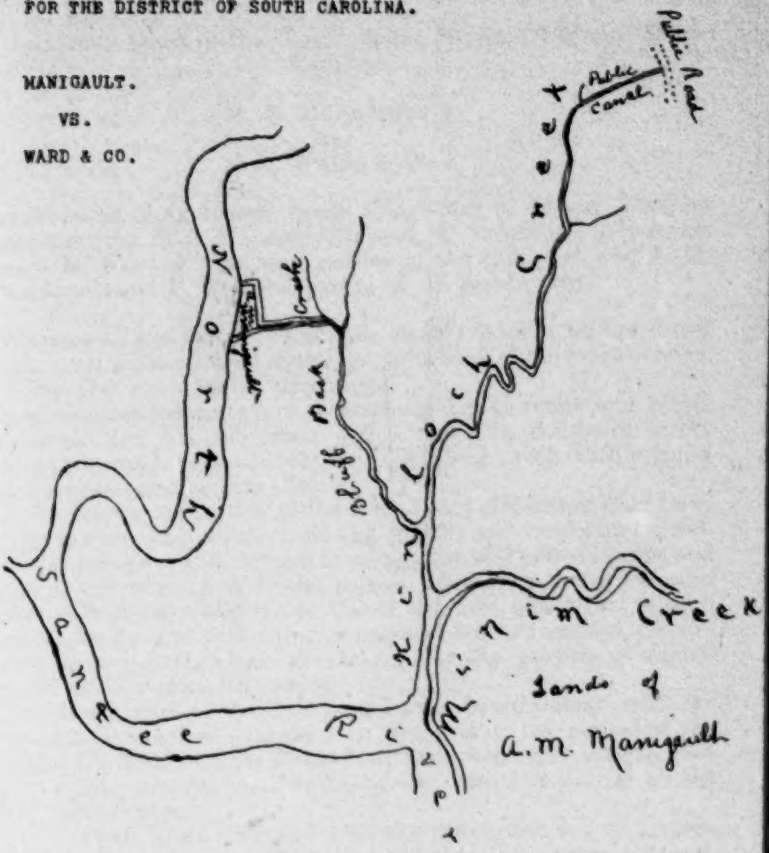
JULIAN MITCHELL, JR.,
[SEAL.] Notary Public for S. C.

(Here follows diagram marked page 11.)

EXHIBIT "A" TO BILL OF COMPLAINT.

IN THE UNITED STATES CIRCUIT COURT
FOR THE DISTRICT OF SOUTH CAROLINA.

MANIGAULT.
VS.
WARD & CO.



Land of A. M. Manigault bounded in red

No. 290
Manigault } p. 11.
Springs et al

12 EXHIBIT "B" TO BILL OF COMPLAINT.

In the Circuit Court of the United States for the District of South Carolina.

A. M. MANIGAULT
vs.
S. M. WARD & Co.

Memorandum of agreement made this — day of August, 1898, by and between St. J. M. Lachicotte and A. A. Springs, co-partners as S. M. Ward & Company, parties of the first part, and A. M. Manigault and F. W. Ford, parties of the second part.

Whereas all the parties hereto are owners of land on the North Santee river adjacent to or in the neighborhood of the creeks known as White Oak creek and Kinloch creek,

And whereas there are now in existence banks across said White Oak creek, and Kinloch creek, with a trunk in the bank across White Oak creek, and a bank across Kinloch creek, with a trunk and floodgate on each side thereof,

And whereas the parties of the second part claim that they have a right to keep open all the time and remove said banks and floodgate and trunks as obstructions to navigation and to free ingress and egress of the water, and to the parties themselves, using the said creeks as highways, and the parties of the first part object to such removal, and claim that the same should not be removed, the following agreement has been entered into for the purpose of adjusting and settling such differences.

Now the parties of the first part hereto, in consideration of the covenants hereinafter expressed on the part of the parties of the second part, do hereby for themselves, their heirs and assigns, covenant, promise and agree to and with the parties of the

13 second part.

First. That from and after the thirty-first day of December, 1898, the said parties of the second part, their agents, servants, and employees, shall have the right to open and keep open all or any part of the said banks and trunks over and across the said two creeks, and to remove all or any part of the banks and obstructions across the said creeks, so as entirely or to such extent as they may see fit—to free and clear both of said creeks, or either of them from all or any part of such obstructions, without any let, hindrance, objection, delay or molestation whatsoever, in act or procurance, by the parties of the first part, their servants, agents or employees.

Second. That the trunks and floodgate now existing shall be kept open and left open except when closed as hereinafter provided and set forth.

Third. That in case of the closing of the floodgate over Kinloch creek, at any time during the continuance of this agreement so as to prevent the ingress and egress through the same by the parties of the second part in their boats or flats, that then and in such case the parties of the second part, their servants, agents and employees, shall, during the time the said floodgate be closed, have the right to cross over the lands of the parties of the first part upon the banks, between said floodgate and the Bear Hill plantation of F. W. Ford, so as to obtain that access to the lands of the parties of the second part that they would otherwise have had by passage of a boat or flat through the said floodgates.

And the parties of the second part, for and in consideration of the covenants and agreements herein expressed on the part of the parties of the first part, do hereby covenant, promise and agree to and with the parties of the first part.

14 First. That they, the parties of the second part, will allow the said banks, trunks and floodgate to remain as they now are, until or after the thirty-first day of December, 1898.

Second. That they will agree to permit the said trunks and flood gate to be closed before said thirty-first of December, 1898, in the manner hereinafter specified.

And it is further mutually covenanted, promised and agreed by and between the said parties that the said trunks and floodgate shall remain open, free to the ingress and egress of the water, unless and in case of such extraordinary tides and freshets as may call for the closing of the same to save the crops of the parties hereto from damage; and in such case they shall only be closed with the mutual consent of the parties hereto, or the consent of one party of the first part and one party of the second part; and in case the parties hereto should not agree that the same be closed, then and in that case the parties of the first part, or one of them, shall select one arbitrator, and the parties of the second part, or one of them, shall select another arbitrator, who shall select a third; and the decision of a majority of such arbitrators shall determine whether the said trunks and floodgate shall be closed, and for how long they shall remain closed.

Witness the hands and seals of the said parties:

ST. J. M. LACHICOTTE. [L. S.]
A. A. SPRINGS. [L. S.]
A. M. MANIGAULT. [L. S.]
F. W. FORD. [L. S.]

Signed, sealed, and delivered in presence of—

——— ———.

(NOTE.—The words "trunk and a floodgate in the" the letter "s" in the word "trunks," and the words "and floodgate" on page 1, erased before execution. Also the word "and" interlined. Also the words "with a trunk and floodgate on each side thereof.")

15 Witness- as to signature of St. J. M. Lachicotte:

W. D. OLIVER.
S. W. ROUQUIER, JR.

As to A. A. Springs:

W. W. PYATT.
S. W. ROUQUIER, JR.

Witness- as to A. M. Manigault and F. W. Ford:

E. H. McCOLLOUGH.
J. M. PAGAN.

STATE OF SOUTH CAROLINA,
Oconee County.

Personally appeared E. H. McCollough, and being duly sworn, made oath that he saw the within named A. M. Manigault and F. W. Ford sign, seal and as their act and deed, deliver the within written deed; and that he, with J. M. Pagan, witnessed the execution thereof by said A. M. Manigault and F. W. Ford.

E. H. McCOLLOUGH.

Sworn to and subscribed before me, this October 2nd, A. D. 1901.

R. T. JAYNES,
Notary Public, S. C.

[SEAL.]

STATE OF SOUTH CAROLINA,
County of ——.

Personally appeared S. W. Rouquier, Jr., and being duly sworn, made oath that he saw the within named St. J. M. Lachicotte and A. A. Springs sign, seal and as their act and deed, deliver the within written deed; and that he, with W. D. Oliver witnessed the execution thereof, by St. J. M. Lachicotte, and that he, with M. W. Pyatt, witnessed the execution thereof by A. A. Springs.

S. W. ROUQUIER, JR.

Sworn to and subscribed before me, this October 5th, A. D. 1901.

F. L. WILLCOX, [L. S.]
Notary Public for S. C.

16 EXHIBIT "C" TO BILL OF COMPLAINT.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court. In Equity.

ARTHUR M. MANIGAULT, Complainant,
vs.
S. M. WARD & Co., Defendants.

EXHIBIT "C."

An Act to Authorize the Construction and Maintenance of a Dam Across Kinloch Creek, in Georgetown County.

Whereas, in order to drain certain low lands in the county of Georgetown, which lands are subject to overflow by reason of high tides and freshets in the Santee river, it has become necessary to construct a dam across Kinloch creek;

And whereas, said creek is situated entirely in Georgetown county, and the lands bordering on said stream are almost entirely owned or controlled by A. A. Springs and St. J. M. Lachicotte, copartners, in business under the firm name of S. M. Ward & Co.

And whereas, by reason of the drainage and protection of said lands from overflow, their taxable value will be greatly enhanced, and without the dam provided for in this bill a large part of the land bordering on said creek will eventually become abandoned and valueless, as some portions of it now are;

And whereas, it is the purpose of the said parties to construct a good and sufficient floodgate so as to allow the water to pass out of said creek;

And whereas, the erection of a dam across Kinloch creek is the only feasible and practicable scheme for the drainage of said lands

And whereas, in order to remove any doubt as to the authority of A. A. Springs and St. J. M. Lachicotte, copartners, doing business as S. M. Ward & Co., to erect, construct and maintain a dam across said "Kinloch creek" now

Be it enacted by the General Assembly of the State of South Carolina:

17 SECTION 1. That the right, power and privilege to construct, erect and maintain a dam across said Kinloch creek is hereby authorized, granted and given to said A. A. Springs and St. J. M. Lachicotte, copartners, doing business under the firm name of S. M. Ward & Co. their heirs and assigns and the survivors of them, or either of them: Provided, that the said A. A. Springs and St. J.

M. Lachicotte, copartners, doing business under the firm name of S. M. Ward & Co. shall be liable for all such damages as may be established in any court of competent jurisdiction by any land owner claiming that his land has been damaged by reason of the erection of said dam.

18 *Subpœna ad Respondendum.*

Filed March 4, 1903.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

The President of the United States of America to A. A. Springs and St. J. M. Lachicotte, co-partners in business under the firm name of S. M. Ward & Co.:

You are hereby strictly commanded and firmly enjoined that all manner of excuses being laid aside, you be and appear before the judges of the circuit court of the United States for the district of South Carolina, at Charleston on the sixth day of April, 1903, twenty days after the service thereof; then and there true and perfect answer to make, upon your corporal oath on the Holy Evangelists, to all such matters as shall be objected against you in the bill of complaint of Arthur M. Manigault.

And also, that you do, on the rules day next immediately after the day appointed and expressed, file, or cause to be filed, in the registry of said court, your plea, answer or demurrer, to the said bill of complaint.

Hereof fail not, under the pain of one hundred pounds.

Given under the seal of the said court.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America, at Charleston, in South Carolina district, aforesaid, the 4th day of March in the year of our Lord one thousand nine hundred and three, and in the one hundred and twenty-seventh year of the sovereignty and Independence of the United States of America.

MITCHELL & SMITH,
Complainant's Solicitors.

C. J. MURPHY,
[SEAL.] C. C. C. U. S., Dist. S. C.

19 Memorandum.

The defendants will take notice that they are required to enter their appearance in this suit, in the clerk's office of the circuit court of the United States for the district of South Carolina, on or before the first Monday of April 1903, otherwise the bill will be taken *pro confesso* against them.

Marshal's Return of Service.

UNITED STATES OF AMERICA,
District of South Carolina.

I hereby certify that on March 5, 1903, I served the within *subpœna ad re.* on A. A. Springs, personally, at Georgetown, S. C. and upon St. J. M. Lachicotte, personally, at Waverly Mills, S. C., by handing to and leaving with each of them a true and correct copy of said paper.

Charleston, S. C. March 6, 1903.

J. DUNCAN ADAMS,
U. S. Marshal,
By A. H. MOWRY, Deputy.

20 Appearance.

Filed April 2nd, 1903.

THE UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit. In Equity.

ARTHUR M. MANIGAULT, Complainant,
vs.
A. A. SPRINGS and ST. J. M. LACHICOTTE, Copartners in Business under the Firm Name of S. M. Ward & Co., Defendants.

To the clerk of the circuit court of the United States for the district of South Carolina:

Please enter my name as appearing for the defendants in the above entitled case.

THEODORE G. BARKER,
Solicitor for Defendants.

April 2nd, 1903.

21 Demurrer, Plea, and Answer.

Filed May 4, 1903.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

ARTHUR M. MANIGAULT, Complainant,
vs.
A. A. SPRINGS and ST. J. M. LACHICOTTE, Copartners in Business under the Firm Name of S. M. Ward & Co., Defendants.

The joint and several demurrer, plea, and answer of A. A. Springs and St. J. M. Lachicotte, copartners in business under the firm name of S. M. Ward and Company, defendants, to the bill of complaint of A. M. Manigault, complainant.

Demurrer.

These defendants by protestation not confessing or acknowledging all or any of the matters and things in the said complainant's said bill contained to be true in such manner and form as the same are therein and thereby set forth and alleged, do demur to the said bill, and for causes of demurrer show

First. That it appears, by said complainant's own showing, that Frederick W. Ford is a necessary party to said bill inasmuch as the contract set up in the bill, Exhibit B, the obligation of which it is charged has been or is impaired by the act of the General Assembly of the State of South Carolina of March 3, 1903, is, on its face, a contract *netween* defendants A. A. Springs and St. J. M. Lachicotte, copartners as S. M. Ward & Co. parties of the first part and the complainant A. M. Manigault and F. W. Ford parties of the second part, jointly, and yet complainant relying (bill par. IV. par. V. pp. 2 and 3. par. VI. p. 4 par. VII. p. 5. par. VIII p. 6) upon said joint agreement under seal and deed of defendants has not made the said F. W. Ford, joint contractor, with him, in said agreement and deed, a party to the said bill.

Second. That the enacting of the act of the General Assembly
22 of the State of South Carolina of March 3, 1903, is not as alleged in par. VII. p. 5 of the bill under the Constitution of the United States a law impairing the contract and covenant entered into by the said defendants hereto in their agreement referred to in said bill—inasmuch as said act of assembly does not in law operate upon said alleged contract.

Third. That the damming of Kinloch creek and its consequent closing as a navigable water highway and the passage of the said act

by the General Assembly of the State of South Carolina is not an impairment of the obligation of any contract alleged (par. VIII pp. 5 and 6 of the bill) to have been entered into by complainant with the State of South Carolina at the time of his acquisition of the properties, viz: his plantation on Minim creek and his alleged mill site on Bluff back creek.

Fourth. That the navigability of Kinloch creek was not guaranteed to complainant by any contract made with him by the State of South Carolina when he acquired the properties referred to in the bill of complaint and the closing of Kinloch creek and the passage of said act of General Assembly is not the impairment of the obligation of a contract under the Constitution of the United States.

Fifth. That the damming of Kinloch creek and its consequent closing as a navigable water highway and the passage of said act by the General Assembly of the State of South Carolina is not (par. VIII, pp. 5 and 6 of the bill) a taking of the property of complainant without compensation therefor under the Constitution of the United States.

Sixth. That the damming of Kinloch creek and its consequent closing as a navigable water highway and the passage of said act of assembly of the State of South Carolina is not (par. VIII, pp. 5 and 6 of the bill) the depriving complainant of his property without due process of law in contravention of section I. article XIV of the Constitution of the United States.

Seventh. That the alleged violations of the provisions of
23 the Constitution and laws of the State of South Carolina (par. VII. par. VIII, pp. 5 and 6, par. IX, pp. 6 and 7, par. X p. 8 of the bill) by the closing of Kinloch creek and the passage of the act of the General Assembly of March 3, 1903, is a subject belonging exclusively to the jurisdiction of the legislative and judicial departments of the government of South Carolina and is not within the cognizance and jurisdiction of the courts of the United States.

Eighth. That section 34 article III of the constitution of South Carolina (par. IX, pp. 6 and 7 of the bill) applies to such roads or highways as are capable of being and are usually laid out, or opened and being so opened capable of being and are usually altered as such roads and does not apply to navigable streams within the control of the State sovereignty.

Ninth. That it was competent for the General Assembly of the State of South Carolina to forbid the introduction of and to refuse to entertain the bill granting to A. A. Springs and St. J. M. Lachicotte the authority to erect a dam across Kinloch creek for want of compliance with the provisions of section 31 of article III chapter 11 of the Code of Laws of South Carolina 1902 and not having forbidden the introduction of said bill and having entertained the same it was competent for the said General Assembly of 1903 to condone and waive the irregularities referred to in the bill of complaint (par. IX, p. 7 and 8 of the bill) and the said act is not null or void or in contravention of law.

Tenth. That these defendants as to the relief sought by the said bill for cause of demurrer show that the said complainant may have an effectual and complete remedy in a court of law.

Eleventh. And as to so much of said bill (Exhibit B. par. IV, pp. 2 and 3, par. V. pp. 3 and 4, par. VI, p. 4. par. VII p. 4) as refers to the contract or agreement or deed made in 1898 between defendants on the one part and complainant and F. W. Ford on the other part these defendants say that on its face said contract shows that it was without a good or valuable consideration which would entitle it to be enforced in a court of equity—and these defendants demur thereto.

24 Twelfth. That on its face said contract imposes on these defendants a restrictive covenant depriving them for all time of the advantageous use of their property by the protection of a dam across Kinloch creek and is oppressive and harsh in its contemplated operation upon defendants and its enforcement by injunction will be unjust and inequitable and defendants demur to the relief so sought in equity. And these defendants do demur to so much of said bill as is herein demurred to and these defendants humbly pray the judgment of this honorable court whether they ought to make any further answer to so much of said bill as is hereinbefore demurred to.

Pleas.

And these defendants not waiving their said several demurrers but wholly relying thereon, as to so much of the said bill as alleges that complainant is the owner in fee of valuable mill site on the Santee river or the waters of Bluff Back creek, a branch of Kinloch creek (par. II, p. 2) and as to so much of said bill as states that said ownership appears by the map or plan of the portions of said creek with the lands adjacent thereto annexed to the said bill as Exhibit "A" (par. II, p. 2) and as to so much of the said bill as alleges (par. V, pp. 3 & 4) that said mill site on Santee river could be used for the purposes of a rice mill or of a saw mill and that one of the main elements of the value of the same is that it has water connection with Bluff Back creek, and that the value of said mill site by reason of its accessibility through Kinloch creek depends upon said Kinloch creek being kept open and unobstructed; and as to so much of said bill (par. III, p. 2) as alleges that Kinloch creek as a navigable highway connects at one point with the main State road or highway leading down from the upper portion of the State down the Santee river. And as alleges that there is a public landing at the point at which Kinloch creek connects with said State road, so as to make a continuous highway from the same over the navigable waters of Kinloch creek to the main State road and thence to the upper country, And as to so much as alleges (par. V, pp. 3 & 4) that any dam or obstruction in Kinloch creek will prevent complainant from access to the said public landing on the State road if he so

desires from his plantation on Santee river through Kinloch creek,
And as to so much as alleges (par. V, p. 4) that such dam or
25 obstruction will prevent plaintiff from access to the rear
of his mill site on Santee river through Bluff Back creek,
And as to so much as alleges (par. V, p. 4) that this will entirely destroy the availability of said mill site for a saw mill, And as to so much of said bill as alleges (par. V, p. 4) that the erection of a dam across Kinloch creek, by preventing the inflow of the rising tide that passes from Santee river through Minim creek and which would otherwise have access and overflow over the whole of Kinloch creek and its branches will cause the water to fall back on Minim creek, so as to compel complainant to raise his banks to his great damage much exceeding two thousand dollars and as to so much of the said bill as alleges (par. VI, p. 4) that the damming and closing of said Kinloch creek by said act is attempted to be authorized and permitted for the mere private purposes and for the greater financial improvement of the private agricultural lands of the defendants hereto and is not authorized or attempted to be authorized for the purposes of improving navigation or for any public use or purpose whatsoever, And as to so much of said bill as alleges (par. VIII, p. 5) that the damming of Kinloch creek and its consequent closing as a navigable water highway is a destruction of part of the value of the said properties of complainant given to him at the time of his acquisition thereof by the constitution of the State and the passage of the said act by the General Assembly of the State of South Carolina is the taking of the property of complainant and the depriving of complainant of his property, And as to so much as alleges (par. VIII, p. 6) that complainant as the owner of his said mill site abutting on Bluff Back creek has as part of his private property the right to an unobstructed passage to and from his said property on and over the waters of Kinloch creek, And as to so much of the said bill as alleges that the — closing of Kinloch creek by the passage of said act, and the loss of access thereby to his said mill site, and the consequent damage to the lands of complainant is the taking of complainant's property without his consent, And as to so much of
26 said bill as alleges (par. XI, p. 8) that the erecting by defendants of a permanent dam and obstruction across Kinloch creek will at once put an end to complainant's use thereof and permanently injure and affect the value of his property irreparably and beyond the power of complainant to prevent and will deprive complainant of his property, these defendants plead thereto and to each and every of said allegations and for plea say: That it is true that complainant holds a deed from Dr. Francis L. Frost, the former owner, dated 4 October 1901 conveying to complainant in fee a tract of land on the Santee river known as a former mill site but that the land so conveyed to complainant lies within the boundaries of a previous deed of complainant to these defendants dated on the twenty ninth day of December 1891 by which complainant conveyed to S. M. Ward & Co. the Newland plantation bounding to the

south on the Santee river—under which deed S. M. Ward & Co. had legal possession and title in October 1901 when the deed of Frost to complainant was executed and delivered to complainant conveying to him the part of the land which had formerly been a mile site; that the subsequent title to the mill site portion so acquired by complainant in 1901 enured to defendants as grantees under complainant's former conveyance of Newland plantation bounding south on Santee river, by virtue of which defendants became and are the lawful owners as defendants are advised of the mill site tract or part of said land, and complainant is not the owner thereof. That said mill site is not valuable as alleged either for the purpose of a rice pounding mill or of a saw mill, that it does not lie on the waters of Bluff Back creek and has no water or other connection therewith. That the map or plan of the portions of said creek with the lands adjacent thereto annexed to the bill as Exhibit "A" is not a true representation of the lands of complainant or of the mill site on Santee river, inasmuch as there is no strip of land nor canal connecting said mill site with Bluff Back creek as is delineated on said alleged map or plan. That said mill site has no water connection with Bluff Back creek. That the value of said mill site does not by reason of its accessibility through
27 Kinloch creek depend upon said Kinloch creek being kept open and unobstructed. That Kinloch creek as a navigable highway does not connect at any point with the main State road ascribed in the bill or with any public road. That there is no public landing at any point on the public road with which Kinloch creek connects, that no continuous highway exists or has existed from a public road over the navigable waters of Kinloch creek, or from the same to the main State road and thence to the upper country. That no dam or obstruction in Kinloch creek will prevent complainant from access to said or any public landing from his plantation on Santee river through Kinloch creek or from access to the rear of his mill site on Santee river through Bluff Back creek, and such dam will not destroy or affect the availability of said mill site for a saw mill. That the erection of a dam across Kinloch creek will not, by preventing the inflow of the rising tide from the Santee river through Minim creek and which would otherwise overflow over the whole of Kinloch creek and its branches cause the water to fall back on Minim creek to any appreciable extent or compel complainant to raise his banks on Minim creek, or to his damage exceeding two thousand dollars or to any amount of damage whatever. That the damming and closing of Kinloch creek by the act of the General Assembly is authorized and permitted for the general welfare and the improvement of the agricultural lands of the State in proximity to the proposed dam and of the rice lands of other land owners on Kinloch creek besides those of the defendants and is not by said act attempted to be authorized or permitted for the mere private purposes and financial improvement of the private agricultural lands of the defendants hereto. That the damming of

Kinloch creek will not destroy or impair the value of any of the properties of complainant that no property of complainant will be thereby taken nor will complainant be deprived of any property. That the erection of said dam will in no wise injure or damage complainant or his property. That its non-erection will seriously damage these defendants.

All of which last mentioned matters and things these de-
28 fendants do plead in bar to so much of the said bill as is herein before pleaded to and these defendants humbly pray the judgment of this honorable court whether they ought to make any further answer to so much of said bill as is hereinbefore pleaded to. And these defendants not waiving their said several demurrers and plea, but wholly relying and insisting thereon, for answer to so much of the said bill as these defendants are advised is material or necessary for them to make answer unto, in aid of their said plea, answer and say, that the said contract set up in the complaint was entered into by these defendants under duress and apprehension, caused by the threat of complainant and the said F. W. Ford in August 1898, when the large and valuable rice crop of defendants estimated to be worth not less than thirty five thousand dollars had been planted and cultivated under the protection of a dam across Kinloch creek and was ready to be harvested, that they would force the removal of said dam, which, if done would have let in the freshet waters or high tides of the Santee river into and upon the rice fields of defendants and destroy their crop to the great damage and probable ruin of defendants. Defendants at the time when said contract was signed by them to save their crop had good reason to believe that on two occasions in 1898 previous to August, when the agreement was made, the complainant had caused tide water to be let in upon their planting lands, to their great loss and damage by the opening of trunks and letting in the water which flooded the plantations adjoining those of defendants and flowed over the line banks between defendants and the neighboring plantations.

ST. J. M. LACHICOTTE.
A. A. SPRINGS.

I hereby certify that aforesaid demurrer is in my opinion well founded in law and is not interposed for delay.

THEODORE G. BARKER,
Solicitor for Defendants.

29 STATE OF SOUTH CAROLINA, }
Georgetown County. }

Before me personally appeared St. J. M. Lachicotte and A. A. Springs and being duly sworn on oath say that the matter and things set forth in the foregoing plea and answer are true in so far

as they are alleged to be upon the knowledge of defendants and as to such as are stated to be on information and belief they believe them to be true, and that defendants' aforesaid demurrer and plea are not interposed for delay.

ST. J. M. LACHICOTTE.
A. A. SPRINGS.

Sworn to before me at Georgetown this second day of May A. D. 1903.

A. L. SMITH,
Clerk of Court.

[SEAL.]

30 Replication.

Filed May 23, 1903.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court. In Equity.

ARTHUR M. MANIGAULT, Complainant,
vs.
A. A. SPRINGS and ST. J. M. LACHICOTTE, Copartners in Business under the Firm Name of S. M. Ward & Company, Defendants.

The replication of Arthur M. Manigault, complainant, to the answer of the defendants, A. A. Springs and St. J. M. Lachicotte, copartners in business under the firm name of S. M. Ward & Co., defendants.

This repliant saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer herein filed on the 4th day of May 1903, for replication thereunto saith, that he will aver and prove his said bill to be true, certain and sufficient in the law to be answered unto; and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto — this repliant without this that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed, or denied is true; all of which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

MITCHELL & SMITH,
Solicitors for Complainant.

31 Notice Setting Down Demurrer for Argument.

Filed May 23, 1903.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court. In Equity.

ARTHUR M. MANIGAULT, Complainant,
vs.
A. A. SPRINGS and ST. J. M. LACHICOTTE, Copartners in Business under the Firm Name of S. M. Ward & Company, Defendants.

To Theodore G. Barker, Esq., solicitor for defendants:

Please take notice that on behalf of the complainant herein the demurrer filed in the above cause on behalf of the defendants on the 4th day of May 1903, is hereby set down for argument before the Honorable C. H. Simonton, circuit judge, on Monday 6th day of July, 1903, (the same being rules day) at the hour of 10 a. m. or as soon thereafter as counsel can be heard, unless some other time and place be set for the hearing thereof by the said circuit judge.

Charleston, S. C., 23rd May, 1903.

MITCHELL & SMITH,
Solicitors for Complainant.

Acceptance of Service.

CHARLESTON, S. C., May 23, 1903.

I hereby acknowledge service of within notice.

THEODORE G. BARKER.

32 Notice of Motion to Strike Pleas from File.

Filed May 23, 1903.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court. In Equity.

ARTHUR M. MANIGAULT, Complainant,
vs.
A. A. SPRINGS and ST. J. M. LACHICOTTE, Copartners in Business under the Firm Name of S. M. Ward & Company, Defendants.

To Theodore G. Barker, Esq., solicitor for defendants:

Please take notice that on the 1st day of June, 1903 (the same being rules day) at the hour of 10 a. m. or as soon thereafter as

counsel can be heard, the undersigned will on behalf of the complainant herein move that the pleas herein filed on behalf of the defendants on the 4th day of May 1903 be struck from the files on the following grounds, to wit:

1. That the said pleas are multifarious.
2. That more than one has been filed without leave of the court first had and obtained.
3. That the said pleas are irregular as involving matters that should be the subject matter of an answer.

MITCHELL & SMITH,
Solicitors for Complainant.

Charleston, S. C., 23rd May, 1903.

Acceptance of Service.

CHARLESTON, S. C., May 23, 1903.

I acknowledge service of within notice.
THEODORE G. BARKER.

33 Order for Hearing to be Had on Demurrer First and Postponing Hearing of Motion to Strike Out Pleas.

Filed March 1, 1904.

THE UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit. In Equity.

ARTHUR M. MANIGAULT
vs.
A. A. SPRINGS and ST. J. M. LACHICOTTE, Copartners in Business under the Firm Name of S. M. Ward & Company.

This case came up this day upon motion to strike the pleas from the files upon the grounds stated in the motion.

Upon examining the record it appears that there is a demurrer, plea and an answer filed in the same paper and all simultaneously. The motion having come up, counsel for the defendants objected on the ground that the argument upon the demurrer filed should be first heard. After hearing counsel for the motion to strike out the pleas, and counsel for the defendants in opposition, it is

Ordered, that the hearing be had upon the demurrer first, and the hearing on this motion to strike out the pleas be postponed until after the hearing on the demurrer.

CHARLES H. SIMONTON,
Circuit Judge.

1 March, 1904.

34 Order Sustaining Demurrer and Dismissing Bill.

Filed March 14, 1904.

THE UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit. In Equity.

ARTHUR M. MANIGAULT
vs.
A. A. SPRINGS and ST. JULIAN M. LACHICOTTE, Copartners in Business under the Firm Name of S. M. Ward & Co.

This case came on to be heard on bill and demurrer. After reading the pleadings and hearing counsel thereon, without passing upon the first ground of demurrer as it is not necessary in view of the opinion I entertain on the bill, it is

Ordered, adjudged and decreed, that all the other grounds of demurrer be sustained and the bill be dismissed.

14 March, 1904.

CHARLES H. SIMONTON,
Circuit Judge.

35 Petition for Appeal.

Filed May 4, 1904.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court. In Equity.

ARTHUR M. MANIGAULT, Complainant,
vs.
A. A. SPRINGS and ST. J. M. LACHICOTTE, Copartners in Business under the Firm Name of S. M. Ward & Company, Defendants.

To the honorable the judges of the circuit court of the United States for the district of South Carolina:

And now comes the petitioner Arthur M. Manigault, complainant in the above entitled cause, and shows that in the record and proceedings in this cause there are manifest errors, and respectfully petitions this honorable court that he may be allowed to appeal from the decree of this court made on the 14th day of March 1904, to the honorable the Supreme Court of the United States, and the

said petitioner doth hereby appeal from the said decree and hereto annexes his assignment of errors and exceptions to said decree, from which this appeal is asked.

MITCHELL & SMITH,
Solicitors for the Complainant, Appellant.

Charleston, S. C., 4th May, 1904.

36 Assignment of Errors.

Filed May 4, 1904.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court. In Equity.

ARTHUR M. MANIGAULT, Complainant,
vs.
A. A. SPRINGS and ST. J. M. LACHICOTTE, Copartners in Business under the Firm Name of S. M. Ward & Company, Defendants.

And now comes the petitioner the complainant Arthur M. Manigault, and assigns for error in the decree of this honorable court made and filed in this cause, on the 14th day of March, 1904, and from which decree an appeal has been prayed, as follows, to wit:

1. That the court erred in sustaining the demurrer herein and dismissing the bill.

2. That the court erred in not holding that the enacting of the statute of the General Assembly of the State of South Carolina, approved 3rd March 1903, annexed as Exhibit "C" to the bill of complaint, was the passing by the State of South Carolina of a law impairing the obligation of a contract by annulling or attempting to annul and avoid the contract and covenant entered into by the defendants herein, with the complainant, in and by their agreement under seal referred to in and annexed as Exhibit "B" to the bill of complaint herein, and that such statute of the State of South Carolina, was the passing of a law in contravention of the provisions of article I section 10 of the Constitution of the United States.

37 3. That the court erred in not holding that the provisions of the constitution of South Carolina declaring that all navigable waters should forever remain public highways was a right and privilege annexed to and constituting a part of the value of the lands and properties of the complainant, situated upon such navigable waters, and that the damming of Kinloch creek and its consequent closing as a navigable water highway, except for the purposes of the public health, the public welfare or the public safety, and after due compensation therefor, is a destruction of part of the value

of the property of the complainant given to him at the time of his acquisition thereof by the constitution and laws of the State of South Carolina; and the passage of the said statute by the General Assembly of the State of South Carolina was an impairment of the obligation of the contract so entered into by the complainant when he was permitted to acquire said property, and is the taking of the property of the complainant without compensation therefor, and the depriving of the complainant of his property without due process of law in contravention of section I of article XIV of the amendments to the Constitution of the United States.

4. That the court erred in not holding that the complainant as the owner of property abutting on a navigable stream, to wit, Kinloch creek, had as part of his private property, the right of riparian owner, to wit, the right of unobstructed passage to and from his said property on and over the waters of Kinloch creek, and that the closing of Kinloch creek by the passage of the said statute, and the loss of access thereby to the property of the complainant and the consequent damage to the lands of the complainant abutting on or contiguous to said Kinloch creek is the taking of the — complainant without his consent, and without compensation therefor, in contravention of the provisions of article I section 10 of the Constitution of the United States and of section I of article XIV of the amendments to the Constitution of the United States and of section 17 article I of the constitution of South Carolina.

38 5. That the court erred in not holding that the aforesaid statute passed by the State of South Carolina, approved March 3rd 1903, was a statute passed for the private purposes of the defendants and to release them from the obligation of their aforesaid contract with the complainant, and was not a statute passed in the exercise of any of the police powers of the State for the public health, the public welfare or the public safety, or for any public purpose soever.

6. That the court erred in not holding that the enactment of the aforesaid statute approved March 3rd 1903, by the General Assembly of the State of South Carolina, was the enacting of a local and special law, concerning the opening of highways and was in contravention of article III section 34 subdivision II of the constitution of the State of South Carolina.

7. That the court erred in not holding that the enactment of the aforesaid statute approved March 3rd 1903 by the General Assembly of South Carolina was the enacting of a local or special law and was in contravention of article III section 34—subdivision XI of the constitution of the State of South Carolina.

8. That the court erred in not holding that in and by sections 31 and 34 of article III, chap. II title 1 of the Code of Laws of South Carolina, 1902, and of sections 31 and 34 of article 3, chapter II title 1 of the Revised Statutes of South Carolina, 1903, it is declared that no bill for the granting of any privilege or immunity or for any other private purpose whatsoever should be introduced or enter-

tained in either house of the General Assembly, except by a petition to be signed by the person or persons desiring any such privilege or immunity, or private grant; of which petition all parties, the rights of whom shall be in anywise proposed to be affected shall have 60 days' notice of the presentation before the same is presented to the General Assembly, and further and additionally that notice of the intention of petitioners to make such application must
39 be published in the newspaper having the largest circulation in the county where the privilege or immunity is to be enjoyed, once a week, for at least three weeks, the first of which publications is to be made at least sixty days before such is presented, and that such requirements of the statutes of South Carolina constituted part of the rights to which private owners of property affected by such intended application or petition were entitled, and that the passage of the aforesaid statute of the 3rd March 1903, was in contravention of the said laws of the State of South Carolina, and was an impairment of the contract entered into by the complainant when he purchased and acquired the property referred to in the bill of complaint, and was the taking of his property without compensation, and without due process of law.

9. That the court should have overruled the demurrer and directed judgment for the defendant.

MITCHELL & SMITH,
Solicitors for Complainant-Appellant.

40 Order Allowing Appeal.

Filed May 4, 1904.

UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court. In Equity.

ARTHUR M. MANIGAULT, Complainant,
vs.
A. A. SPRINGS and ST. J. M. LACHICOTTE, Copartners in Business under the Firm Name of S. M. Ward & Company, Defendants.

The petitioner, the complainant Arthur M. Manigault, having appealed from the decree in this cause entered on the 14th day of March, 1904, and having duly filed his petition, for appeal with his assignment of errors to said decree,

Now, on consideration thereof, it is

Ordered, that the said appeal be allowed, and that a transcript of the record in said cause aforesaid be transmitted to the United States Supreme Court.

It is further ordered, that the said petitioner do enter into a bond in the sum of two hundred and fifty dollars conditioned that if the above named Arthur M. Manigault shall prosecute such appeal to effect, and answer for all damages and costs if he shall fail to make such appeal good, then such obligation to be void, otherwise to remain in full force and virtue.

Ordered further, that the said bond shall be filed within twenty days from the order of this court, and shall be approved by a judge or the clerk of this court.

WM. H. BRALWEY,
U. S. Judge.

May 4, 1904.

41 Appeal Bond and Approval.

Filed May 12, 1904.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court. In Equity.

ARTHUR M. MANIGAULT, Complainant,
vs.
A. A. SPRINGS and ST. J. M. LACHICOTTE, Copartners in Business under the Firm Name of S. M. Ward & Company, Defendants.

Know all men by these presents, that Arthur M. Manigault and American Bonding Company of Baltimore, are held and firmly bound unto C. J. Murphy, clerk of the circuit court of the United States for the district of South Carolina, in the sum of two hundred and fifty dollars ($250.00) to be paid to the said C. J. Murphy clerk of such United States circuit court for the district of South Carolina, his successors in office and assigns, for the payment of which well and truly to be made and done, they hereby bind themselves and each of their successors, executors and administrators or assigns jointly and severally, firmly, by these presents.

Sealed with the seals of the parties hereto, and dated this 12th day of May, in the year of our Lord one thousand nine hundred and four.

Whereas, the above named Arthur M. Manigault hath prosecuted an appeal to the Supreme Court of the United States from the decree rendered in the above entitled cause on the 14th day of March, 1904,

Now, therefore, the condition of this obligation is such that
42 if the above named Arthur M. Manigault shall prosecute said appeal to effect and answer for all damages and costs, if

he shall fail to make such appeal good, then this obligation to be void, otherwise to remain in full force and virtue.

A. M. MANIGAULT. [L. S.]
AMERICAN BONDING COMPANY
OF BALTIMORE, [SEAL.]
By T. MOULTRIE MORDECAI, Attorney in Fact.

Signed, sealed and delivered in the presence of:
Witness as to A. M. Manigault:

E. C. HASELDEN.
MATTHEW J. BLANCHE.

Approved as to form and sufficiency.

C. J. MURPHY,
[SEAL.] C. C. C. U. S., Dist. S. C.

May 2, 1904.

43 Citation.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court. In Equity.

ARTHUR M. MANIGAULT, Complainant,
vs.
A. A. SPRINGS and ST. J. M. LACHICOTTE, Copartners in Business under the Firm Name of S. M. Ward & Company, Defendants.

To A. A. Springs and St. J. M. Lachicotte, copartners in business under the firm name of S. M. Ward & Company, defendants above named, Greeting:

You and each of you are hereby cited and admonished to be and appear before the United States Supreme Court, to be holden at Washington, on the 3rd day of June next ensuing, pursuant to an appeal taken by Arthur M. Manigault from the decree of the circuit court of the United States for the district of South Carolina, rendered in the above entitled cause in said court in equity, wherein said Arthur M. Manigault is complainant and the said A. A. Springs and St. J. M. Lachicotte copartners in business under the firm name of S. M. Ward & Company are defendants; and you are commanded to show cause, if any there be, why such decree rendered against the complainant should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Honorable William H. Brawley, judge of the district court of the United States for the district of South Carolina and as

such one of the judges of the circuit court of the United
44 States for such district this 4th day of May A. D. nineteen hundred and four.

WM. H. BRAWLEY,
U. S. Judge.

CHARLESTON, S. C., May 4, 1904.

I accept service of above citation.

THEODORE G. BARKER,
Solicitor for Defendants.

Filed in this office May 4 1904.

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

45 Clerk's Certificate.

UNITED STATES OF AMERICA, District of South Carolina, } *To wit:*

In the Circuit Court, Fourth Circuit. In Equity.

I, C. J. Murphy, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify, that the foregoing record is a true and correct copy of all the records, proceedings and decree, constituting the record on appeal in the case of Arthur M. Manigault, complainant, against A. A. Springs and St. J. M. Lachicotte, copartners in business under the firm name of S. M. Ward & Co., defendants, rendered as aforesaid, together with all the proceedings had in the cause relating to the same.

Given under my hand and seal of said court, at clerk's office, in the city of Charleston, and district aforesaid, this 28th day of May, A. D. 1904.

Seal U. S. Circuit Court, District of So. Carolina.

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

Endorsed on cover: File No. 19,390. South Carolina C. C. U. S. Term No. 290. Arthur M. Manigault, appellant, *vs.* A. A. Springs & St. J. M. Lachicotte, copartners in business under the firm name of S. M. Ward and Company. Filed June 6", 1904. File No. 19,390.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 46.

ARTHUR M. MANIGAULT, APPELLANT,

versus

A. A. SPRINGS AND ST. J. M. LACHICOTTE, CO-PARTNERS IN BUSINESS UNDER THE FIRM NAME OF S. M. WARD & CO., APPELLEES.

BRIEF OF ARGUMENT ON BEHALF OF APPELLANT.

I.

STATEMENT OF THE CASE.

1.

Character of Appeal.

This appeal is from a final decree sustaining a demurrer to the bill and dismissing the bill.

2.

Parties.

The complainant, the owner of a rice plantation, is a riparian proprietor on a navigable stream or creek in the State of South Carolina. The defendants are adjoining land owners on the same stream. The stream had been used by all parties for purposes of navigation and access to their respective properties.

3.

Hearing Below.

The case was heard below upon bill and demurrer, and this appeal is from the decree sustaining the demurrer and dismissing the bill. Before the hearing of the demurrer an interlocutory application had been made to the Circuit Judge at chambers for a temporary injunction. Upon this interlocutory application the court declined to issue the injunction. (*Manigault* v. *Ward & Co.*, 123 Fed. Rep., 707.)

Thereafter a demurrer to the whole bill was filed and the case coming on to be heard upon the demurrer, the court dismissed the bill.

4.

Facts of the Case.

Under the demurrer, the facts are admitted as stated in the bill. (*Transcript, ff. 1-10.*)

In 1898, and for some time prior, the complainant and two defendants, together with one F. W. Ford, were all adjoining land owners and riparian proprietors, planting rice on their respective plantations, on or near a creek known as Kinloch creek, on Santee river, in Georgetown county, in South Carolina. This creek furnished access as an highway to all the respective proprietors. At that time the defendants constructed a bank across Kinloch creek for their own purposes. This bank across Kinloch creek was objected to by the complainant herein, and the said F. W. Ford, as an interference with and an obstruction to their rights of passage and irrigation. The complainant further objected that the effect of the bank was to injure him on his lands adjacent to Kinloch creek by compelling him to raise his dykes around his lands. After a contest, a contract of agreement was entered into under seal and executed by the parties whereby it was agreed that the obstruction or bank across Kinloch creek should be continued until the 31st day of December, 1898; but that from and after the 31st day of December, 1898, this obstruction or bank should be removed so as to give the complainant and F. W. Ford clear passage through the creek, and should never be replaced. (*Transcript, ff. 12-14.*)

Matters so continued until March, 1903, when the defendants procured a statute from the Legislature of South Carolina allow-

ing them to dam this creek, notwithstanding their contract. At the time this statute was passed the law of South Carolina provided that no franchise, privilege or immunity for any private purpose should be introduced or entertained in the General Assembly of the State unless a petition for the same should be addressed to the General Assembly, and all parties to be affected thereby had been given notice of such petition sixty days before the presentation of such petition to the General Assembly, and notice of the intention to present the same had also been published in the county where the privilege or immunity was to be enjoyed, once a week for at least three weeks before such petition was presented. (*See Sect. 31 and 34 of the Code of Laws of S. C. in appendix to this argument.*)

The defendants made no such petition to the General Assembly, nor did they give any notice to the complainant herein of their intention to present it, nor was any notice of the same published before its presentation, but without notice of any kind to the complainant, or any publication of intention, the defendants procured the passage through the Legislature of an act allowing them to erect a dam across Kinloch creek.

Upon plaintiff being advised of the passage of this act, and defendants proceeding to erect the dam, the present bill was filed for an injunction to prevent them erecting the same.

5.

Decree.

The decree in general terms sustained the demurrer and dismissed the bill. (*Transcript, fo. 34.*)

II.

SPECIFICATIONS OF ERROR.

1.

That the court erred in not holding that the enacting of the statute of the General Assembly of the State of South Carolina, approved 3rd March, 1903, annexed as Exhibit "C" to the bill of complaint, was the passing by the State of South Carolina of a law impairing the obligation of a contract by annulling, or attempting to annul, or avoid, the contract and covenant entered

into by the defendants with the complainant, in and by their agreement under seal referred to in and annexed as Exhibit "B" to the bill of complaint, and that such statute of the State of South Carolina was the passing of a law in contravention of the provisions of Article I, Section 10, of the Constitution of the United States.

2.

That the court erred in not holding that the provisions of the Constitution of South Carolina, declaring that all navigable waters should forever remain public highways, was a right and privilege annexed to and constituting a part of the value of the lands and properties of the complainant situated upon such navigable waters, and that the damming of Kinloch creek and its consequent closing as a navigable water highway, except for the purposes of the public health, the public welfare or the public safety, and after due compensation therefor, is a destruction of part of the value of the property of the complainant given to him at the time of his acquisition thereof by the Constitution and laws of the State of South Carolina; and the passage of the said statute by the General Assembly of the State of South Carolina was an impairment of the obligation of the contract so entered into by the complainant when he was permitted to acquire said property, and is the taking of the property of the complainant without compensation therefor, and the depriving of the complainant of his property without due process of law in contravention of Section 1 of Article XIV of the amendments of the Constitution of the United States.

3.

That the court erred in not holding that the complainant, as the owner of the property abutting on a navigable stream, to-wit, Kinloch creek, had as part of his private property, the right of a riparian owner, to-wit, the right of unobstructed passage to and from his said property on and over the waters of Kinloch creek, and that the closing of Kinloch creek by the passage of the said statute, and the loss of access thereby to the property of the complainant and the consequent damage to the lands of the complainant abutting on or contiguous to said Kinloch creek, is the taking of the property of complainant without

his consent, and without compensation therefor, in contravention of the provisions of Article I, Section 10, of the Constitution of the United States, and of Section 1 of Article XIV of the amendments to the Constitution of the United States, and of Section 17, Article I, of the Constitution of South Carolina.

4.

That the court erred in not holding that the aforesaid statute passed by the State of South Carolina, approved March 3rd, 1903, was a statute passed for the private purposes of the defendants and to release them from the obligation of their aforesaid contract with the complainant, and was not a statute passed in the exercise of any of the police powers of the State for the public health, the public welfare or the public safety, or for any public purposes soever.

5.

That the court erred in not holding that the enactment of the aforesaid statute, approved March 3rd, 1903, by the General Assembly of the State of South Carolina, was the enacting of a local and special law, concerning the opening of highways, and was in contravention of Article III, Section 34—Subdivision XI, of the Constitution of the State of South Carolina.

6.

That the court erred in not holding that in and by Sections 31 and 34 of Article III, Chap. II, Title 1, of the Code of Laws of South Carolina, 1902, and Sections 31 and 34 of Article III, Chapter II, Title 1, of the Revised statutes of South Carolina, 1893, it is declared that no bill for the granting of any privilege or immunity, or for any other private purpose whatsoever, should be introduced or entertained in either house of the General Assembly, except by a petition to be signed by the person or persons desiring any such privilege or immunity, or private grant; of which petition all parties, the rights of whom shall be in anywise proposed to be affected, shall have sixty days' notice of the presentation before the same is presented to the General Assembly, and further and additionally that notice of the intention of petitioners to make such application, must be published in the newspaper having the largest circulation in the county

where the privilege or immunity is to be enjoyed, once a week, for at least three weeks, the first of which publications is to be made at least sixty days before such is presented, and that such requirements of the statutes of South Carolina constituted part of the rights to which private owners of property affected by such intended application or petition were entitled, and that the passage of the aforesaid statute of the 3rd March, 1903, was in contravention of the said laws of the State of South Carolina, and was an impairment of the contract entered into by the complainant when he purchased and acquired the property referred to in the bill of complaint, and was the taking of his property without compensation, and without due process of law.

III.

POINTS OF LAW.

There are five points involved in the discussion on the statute.

1. The impairment of a contract.
2. The deprivation of property without due process of law.
3. That it closes a highway without compensation.
4. It is the passage of special legislation.
5. That no notice of intended passage was given.

The two first questions are Federal, arising under the Constitution of the United States; the three last arise under the State Constitution.

These last are necessarily to be discussed and decided under the rule:

"If on the face of the complaint or declaration, the case is "one which the court has the power to hear and determine, be- "cause of the existence of a Federal question, it has the right "to decide every issue that may subsequently be raised, and "whether the decision of the case ultimately turns on a question "of Federal, local or general law is a matter that in no wise "affects the jurisdiction of the court."

St. Paul M. & M. Ry Co. v. *St. Paul N. P. Ry. Co.,* 68 Fed. Rep., 10.

Mayor v. *Cooper,* 6 Wall., 247.

Railroad Co. v. *Mississippi,* 102 U. S., 141.

Tennessee v. *Davis,* 100 U. S., 257.

1.

The Impairment of a Contract.

The main question in the whole case is that of the impairment of a contract, and involves first the point whether there was or was not a contract.

Was There a Contract?

Upon the face of it the answer to this question can be only an affirmative. There is undoubtedly a contract in writing entered into and duly executed under seal. The terms of that contract are clear and explicit. The defendants, Ward & Co., claimed the right to obstruct Kinloch creek by a dam across it. The complainant denied their right, and a compromise was entered into whereby upon the complainant's consenting to the dam remaining until the 31st day of December, 1898, the defendants bound themselves under seal that after that date that dam might be removed by the plaintiff so as to entirely free and clear the creek without any let, hindrance, objection, delay or molestation whatsoever in act or procurance on the part of defendants. We have therefore a case where for the settlement of a question of disputed right and for consideration given, there is an express covenant under seal on the part of the two defendants to this present bill of complaint binding themselves not to interfere, directly or indirectly, either by act or procurance, with the entire clearing of the creek from all obstruction. (*Transcript, ff. 12, 15.*)

The demurrer avers that the contract is no contract enforceable on any account, because it appears on its face that it was without a good or valuable consideration.

But it was made under seal, and that imports a consideration.

Storm v. *U. S.*, 94 U. S., 84.

It contained mutual concessions and covenants, and they are a sufficient consideration.

Park Bros. & Co. v. *Kelly*, 49 Fed. Rep., 625.

Does the Statute Impair the Contract?

Does the statute in question impair the obligation of this contract? Upon the face of it also the answer to this question

can only be in the affirmative. The statute in question undertakes not simply to impair but entirely to annul and abrogate this contract. (*Transcript, ff. 16-18.*) The statute undertakes to authorize the same two individuals who made the contract to ignore it. It authorizes these two individuals as individuals to do exactly what they had bound themselves by the contract to do—*i. e.*, to put a dam across Kinloch creek and close it by an obstruction. The contract and the statute are on the face of each document in absolute and irreconciliable conflict. By the contract the defendants bind themselves not to obstruct Kinloch creek; by the statute they are expressly granted the right, power and privilege to obstruct and close Kinloch creek.

Prima facie the right is entirely with Manigault, the complainant. He has an express contract which binds the defendants, and the defendants are refusing compliance with their contract, on the ground that the statute has justified them in so doing.

It is true the statute does not mention or refer to the contract, but its intended effect is as clear as if it did.

It has been frequently held by this court that legislation impairing contracts is obnoxious to the constitutional provision, although all reference to the contracts to be affected is carefully avoided. The statute is construed by its *effect.*

The subject matter of the contract was entirely within the scope of a covenant.

It related to the exclusive or joint use of the creek. Even were the right of a public character, an individual can (except where forbidden by public policy) bind himself not to exercise said right.

Oregon & Co. v. *Winsor,* 20 Wall., 64.
Hulse v. *Bonsach Machine Co.,* 65 Fed. Rep., 864.

The real position of defendants is that the statute is valid as an exercise by the State of its police power. That in the exercise of the police power the State has the right to pass a statute, although the effect of such statute may be to impair a contract.

The Police Power.

Is the statute an exercise of the police power?

The statute, upon the face of it, does not purport to be in exercise of any police power. It is the grant of a right, power

and privilege; in other words, the grant of a *franchise* to two individuals who are co-partners under the firm name of S. M. Ward & Co. It recites that the value of their private lands will be much enhanced if they are allowed to erect a dam across Kinloch creek, and then grants to the individuals, their heirs and assigns, this privilege. The entire act is for the benefit, and sole benefit, of the lands owned by these individuals. The statute notes that there are other lands in the vicinity owned by other individuals, but it does not purport to give any such privilege to the other owners of land in the vicinity or the public. The privilege is restricted to the two individuals named, the defendants in this suit, and is granted to them irrespective of the benefit or advantage to other adjoining land owners. It is a personal grant of a personal franchise for the direct personal benefit of the parties named. Upon the face of it, therefore, the statute is not in the exercise of the police power of the State and for the benefit of the State as a whole, not being a statute passed for the protection of the public health, the public safety or the public morals.

This court has so far refrained from any attempt to define the term "police power."

(*Jacobson* v. *Massachusetts*, 197 U. S., 251.)

The principles of construction applicable to statutes as a test whether they have been properly passed in the exercise of the police power have been enunciated.

"they must have some relation to these ends. Under the "mere guise of police regulations, personal rights and private "property cannot be arbitrarily invaded, and the determination "of the Legislature is not final or conclusive. If it passes an "act ostensibly for the public health, and thereby destroys or "takes away the property of a citizen, or interferes with his "personal liberty, then it is for the courts to scrutinize the act "and see whether it really relates to and is convenient and "appropriate to promote the public health. It matters not that "the Legislature may in the title to the act, or in its body, de-"clare that it is intended for the improvement of the public "health." * * *

"Whether or not a use is a public one which will justify the "exercise of the power, is a judicial question. It may be diffi-"cult sometimes to determine whether a use is public or private. "Although the Legislature may declare it to be public, that does

"not necessarily determine its character; it must in fact be pub-
"lic, and if it be not, no legislative fiat can make it so, and any
"owner of property attempted to be taken for a use really pri-
"vate can invoke the aid of the courts to protect his property
"rights against invasion."

* * * * * * *

"the courts must be able to see that it has at least in
"fact some relation to the public health, that the public health
"is the end actually aimed at, and that it is appropriate and
"adapted to that end."

In re Jacobs, 98 N. Y., 98. (pp. 110, 111, 115.)

"To justify the State in thus interposing its authority on
"behalf of the public, it must appear first, that the interests of
"the public generally, as distinguished from those of a particu-
"lar class, require such interference; and second, that the means
"are reasonably necessary for the accomplishment of the pur-
"pose and not unduly oppressive upon individuals. The Legisla-
"ture may not under the guise of protecting the public interests
"arbitrarily interfere with private business."

Lawton v. *Steele,* 152 U. S., 133.

"The courts are not bound by mere forms, nor are they to be
"misled by mere pretenses. They are at liberty—indeed, are
"under a solemn duty—to look at the substance of things, when-
"ever they enter upon the inquiry whether the Legislature has
"transcended the limits of its authority. If, therefore, a
"statute purporting to have been enacted to protect the public
"health, the public morals, or the public safety, has no real
"or substantial relation to those objects, or is a palpable in-
"vasion of rights secured by the fundamental law, it is the duty
"of the courts to so adjudge and thereby give effect to the Con-
"stitution."

Mugler v. *Kansas,* 123 U. S., 661.

The statute in question is clearly on the face of it not a measure intended for the public health, the public safety, or the public morals.

Under the police power the State may *destroy* obnoxious or pernicious property or substances, but it cannot *appropriate* them for public use.

It is *prohibitive,* not *constructive,* as applied to the use of individual property or the regulation of individual pursuits.

It can *destroy* diseased cattle, or impure foods, or liquor, or

obscene pictures, or any article adjudged to be obnoxious to the public health, morals or safety—but it cannot appropriate and use them for public or private purposes, save under the exercise of the power of eminent domain and after due compensation.

Leovy vs United States Not Applicable.

The case relied upon by the counsel for the defendants below and apparently by the learned Judge in his decision on the demurrer is the case of *Leovy* v. *U. S.*, 177 U. S., 621. This case, however, so far from being an authority in favor of defendants' position, is an authority against it. The facts of that case were as follows: Robert S. Leovy was the syndic or official of the ward in which a stream or crevasse known as "Red Pass" was situated. The Police Jury of the Parish of Plaquemines passed a resolution directing the syndic to have "Red Pass" closed by a dam, in order to promote the health of the community. "Red Pass" was not a natural stream, but was in the nature of a crevasse caused by the overflow of water from the Mississippi river. The object of closing "Red Pass" was by the construction of a levee at that point to prevent the overflow from the Mississippi river passing through "Red Pass" into the adjoining country.

An indictment was found against Leovy for erecting this dam as in contravention of the act of Congress of September 13, 1890, forbidding the erection of any obstruction in any navigable waters of the United States without the permission of the Secretary of War. The indictment charged that this dam had been constructed across a navigable water of the United States without the permission of the Secretary of War. The only question in the case was whether "Red Pass" was a navigable water of the United States in such a sense that a dam could not be erected therein without the previous authorization of the Secretary of War.

The Supreme Court decided that in the absence of any express legislation of the United States forbidding the construction of such a dam the existing acts of Congress were not intended to apply to the case of a stream of the history and character disclosed in the record, and that the State authorities were left free to act in such a manner as they thought fit to promote the health and prosperity of the people concerned. It will be seen that the entire question in that case was as to the right to

dam this crevasse without the authority of the Secretary of War. Whether, assuming as the court did assume, that the act of the public syndic in closing "Red Pass" was an official act done by a State official for the purpose of promoting the public health, the closing a stream or crevasse of the character of "Red Pass" was a violation of the act of Congress? This court decided that it was not. No question of the right or property of individuals was concerned, nor were they ever disclosed in the case. The entire discussion turned upon the question whether the State could obstruct a stream of the character of "Red Pass," when by the evidence furnished it did not appear to the court to be a navigable stream of the United States within the meaning of the act of Congress.

No such question exists in the case at bar. The bill alleges, and the demurrer admits, that Kinloch creek, the creek in question, is a navigable stream or water highway. If the question before the court was whether the defendants had the right to obstruct Kinloch creek without the permission of the Secretary of War, the court would be bound under the admission of the demurrer to hold that as it was admitted to be a navigable stream of the United States, and under the principles decided in the "Red Pass" case, it could not be obstructed without the permission of the Secretary of War. That, however, is not the question. The question is whether the State can, under the guise of a police measure, permit private individuals to annul their contract and obstruct a dam across a navigable stream, to the injury of other individuals? By the analysis of the act, we have shown that upon the face of it the act does not purport to be for the public health, but for the purpose only of allowing certain private individuals to construct the dam for the enhancement of their own particular property. This privilege of constructing a dam is not given to them for the benefit of the community, but is given to them personally so that they can construct or not construct as they see fit.

It follows that the contention of the defendants that this statute abrogating their contract can be sustained as an exercise of the State's police power, cannot be sustained.

Can it be sustained as an exercise of the power of eminent domain?

2.

The Deprivation of Property Without Compensation or Due Process of Law.

The defendants in their position below attempted to justify the statute by insisting that it was a valid exercise of the State's power for the general welfare. If so, it could not be so regarded as coming under the *police power*, and could only be treated as the exercise by the State of this right of *eminent domain*.

Eminent Domain.

The State has unquestionably the right to use or appropriate private property for public purposes, but in such case the public must bear the burden of *compensation* to the individual injured for its benefit.

The distinction is clear.

Under the police power, the State can regulate the use but not destroy the existence of private property, except where that property is in itself positively pernicious to the public welfare, and its existence forbidden by law, as in the case of dynamite or liquor or diseased cattle.

In such case, the damage to the individual incidental to such regulation is not a damage that he is entitled to receive compensation for.

Under the power of eminent domain, the State can appropriate private property for public purposes, but only on condition of full compensation to the party whose property is appropriated.

The Constitution of the State of South Carolina provides, Art. I, Sect. 17:

"Private property shall not be taken for private use without " the consent of the owner, nor for public use without just com- " pensation being first made therefor."

When payment of compensation before taking private property for public use is expressly required by constitutional provisions; payment, or its equivalent tender of payment, is a condition precedent to the taking, and where the Constitution expressly requires prepayment, it is, of course, beyond the power

of the Legislature to authorize taking without prepayment, and any statute assuming to do so is void.

The complainant is a riparian proprietor on a navigable stream.

The Constitution of South Carolina declares, Art. I, Section 28:

"All navigable waters shall forever remain public highways, " free to the citizens of the State and the United States without " tax, impost, or toll imposed."

And Section 29:

"The provisions of the Constitution shall be taken, deemed " and construed to be mandatory and prohibitory, and not " merely directory, except where expressly made directory or " permissory by its own terms."

The statute law provides, Title X, Chap. XXVIII, Section 1335, of the Code of Laws, 1902:

"All streams which have been rendered, or can hereafter be " rendered capable of being navigated by rafts of lumber or " timber by the removal of accidental obstruction, and all navi- " gable water courses and cuts are hereby declared navigable " streams, and such streams shall be common highways, and " forever free as well to the inhabitant of this State as to the " citizens of the United States, without any tax or impost there- " for, unless the same be expressly provided for by the General " Assembly."

The common law with regard to riparian proprietors is the law of South Carolina.

McCullough v. *Wall*, 4 Rich., 68.
Shands v. *Triplett*, 5 Rich. Eq., 78.

As a riparian proprietor, the complainant is entitled not only to the free use of the stream as a highway, but

" he is certainly entitled to the rights of a riparian proprietor " whose land is bounded by a navigable stream; and among " those rights are access to the navigable part of the river from " the front of his lot, the right to make a landing wharf or pier " for his own use, or for the use of the public, subject to such " general rules and regulations as the Legislature may see

" proper to impose for the protection of the rights of the public,
" whatever those may be."

* * * * * * *

"This riparian right is property, and is valuable, and though
" it must be enjoyed in due subjection to the rights of the public,
" it cannot be arbitrarily or capriciously destroyed or impaired.
" It is a right of which when once vested, the owner can only
" be deprived in accordance with established law, and if neces-
" sary that it be taken for the public good, upon due compensa-
" tion."

Yates v. *Milwaukee,* 10 Wall., 497.

Approved and confirmed in *Weber* v. *Harbor Commissioners,* 18 Wall., 57.

Potomac Steamboat Co. v. *Upper Pot. S. Co.,* 109 U. S., 682.

"The riparian proprietor is entitled, among other rights as held
" in *Yates* v. *Milwaukee,* 10 Wall., 497, 504, to access to the
" navigable part of the water on the front of which lies his land,
" and for that purpose to make a landing wharf or pier for his
" own use, or for the use of the public, subject to such general
" rules and regulations as the Legislature may prescribe for the
" protection of the rights of the public."

Illinois Central R. R. v. *Illinois,* 146 U. S., 445.

Nor is this rule in its application to the present case at all affected by the decisions in

Shively v. *Bowlby,* 152 U. S., 1.
Gibson v. *U. S.,* 166 U. S., 269.
Scranton v. *Wheeler,* 179 U. S., 141.

In *Shively* v. *Bowlby* the point decided was that

"The title and rights of riparian or littoral proprietors in the
" soil below the high water mark therefore, are governed by the
" laws of the several States, subject to the rights granted to the
" United States by the Constitution." (p. 58.)

In *Gibson* v. *U. S.* the point decided was that all riparian proprietors on navigable streams held then these rights subject to the servitude of the right of the State or United States to regulate or *improve navigation.*

"Moreover, riparian ownership is subject to the obligation to
" suffer the consequences of the improvement of navigation in

"the exercise of the dominant right of the government in that "regard." (p. 276.)

In *Scranton* v. *Wheeler* the same point was decided, p. 164:

"The riparian owner acquired the right of access to naviga- "bility subject to the contingency that such right might become "valueless in consequence of the erection under competent au- "thority of structures on the submerged lands in front of his "property for the purpose of improving navigation."

But this court adds, p. 164:

"When erecting the pier in question the government had no "object in view except in the interest of the public to improve "navigation. It was not designed arbitrarily or capriciously "to destroy rights belonging to any riparian owner."

From these decisions it follows that the rights of a riparian proprietor are not absolute, but subject to a servitude, viz., the right of the dominant sovereignty, State or Federal, to *improve navigation.*

In all other respects his rights, when once vested, are the same as those of any other landowner, subject to no servitude as such, but subject, of course, to the right of the dominant power sovereignty, State or Federal, to *take* or appropriate his riparian properties for public use, but upon payment of compensation.

In the case before the court the statute does not pretend to be for the *improvement of navigation.* It does not pretend to be for any public purpose beyond the enhancement of the taxable value of the lands of the defendants, and in order to enhance the value of the defendants' lands, the legislature authorizes those defendants, if they see fit, to erect a dam which will reduce the value of the complainant's property.

So far from the statute being a statute to *improve* navigation, it is intended to *destroy* navigation, and by closing the creek to prevent all access by riparian proprietors.

The State of South Carolina, it may be, could have provided in its Constitution that the rights of all riparian proprietors should be held subject to the power of the State to deal with them as it saw fit. It has not done so. It has declared to all riparian proprietors that they have all the rights pertaining to such at common law, and guaranteed that all such navigable

streams should be forever free and open highways, subject only to the right of the State to deal with them as the public interests required for the purpose of the *improvement of navigation.*

"If they choose to resign to riparian proprietors rights which " properly belong to them in their sovereign capacity, it is not " for others to raise objections."

Barney v. *Keokuk,* 94 U. S., 324.
Packer v. *Bird,* 137 U. S., 661.
Hardin v. *Jordan,* 140 U. S., 371.

Deprivation of Due Process of Law.

The rule is well settled that the taking by statute of the private property of a person or corporation is not due process of law.

Yates v. *Milwaukee,* 10 Wall., 504.
Pumpelly v. *Green Bay Co.,* 13 Wall., 166.

"The taking by a State of the private property of one person " or corporation without the owner's consent for the private " use of another is not due process of law, and is a violation of " the Fourteenth Article of Amendment of the Constitution of " the United States."

Missouri Pac. Ry. v. *Nebraska,* 164 U. S., 417.

"Recognizing the difficulty of defining with exactness the " phrase 'due process of law,' it is certain that these words im- " ply a conformity with natural and inherent principles of jus- " tice and forbid that one man's property or right to property " shall be taken for the benefit of another, or for the benefit of " the State, without compensation."

Holden v. *Hardy,* 169 U. S., 383.

"The permission, or command of the State, can give no power " to invade private rights, even for a public purpose, without " payment of compensation."

Muhlker v. *New York & H. R. Co.,* Sup. Ct. U. S., decided 10 April, 1905; 25 Sup. Court Reporter, 523.

Anterior to the Fourteenth Amendment.

The cases relied on by the counsel for the defense in the argument below were

Wilson v. *Black Bird Creek Marsh Co.*, 2 Pet., 247.
Gilman v. *Philadelphia*, 3 Wall., 713.

In the case of *Wilson* v. *Black Bird Creek Marsh Co.* the legislature of Delaware had authorized a corporation to construct a dam across Black Bird Creek. The question was only whether this was in violation of the clause of the United States Constitution giving the United States power "to regulate commerce with foreign nations and among the several States." The court decided it was not. There was no question here of the impairment of a contract, nor of the destruction of riparian rights.

"But the measure authorized by this act stops a navigable "stream, and must be supposed to abridge the rights of those "who have been accustomed to use it; but the abridgement, "unless it comes in conflict with the Constitution or a law of the "United States, is an affair between the Government of Dela- "ware and its citizens, of which this court can take no cogni- "zance."

So in the case of *Gilman* v. *Philadelphia*, decided in 1865, the case turned entirely upon the point whether the State statute authorizing the construction of a bridge across the Schuylkill was in conflict with the clause of the Federal Constitution empowering Congress to regulate commerce.

The court decided that it was not; that until Congress had legislated otherwise the States were free to act in such cases for the public benefit.

"Until the dominant power of the Constitution is awakened "and made effective by appropriate legislation the reserved "power of the States is plenary and its exercise in good faith "cannot be made the subject of review by this court."

No question was made or disscusse as to the impairment of any contract or as to the deprivation of rights without compensation.

On the contrary, the court decided in the *Black Bird Creek Case* that the question was one between the State of Delaware

and its citizens whether they or any of them had been deprived of rights for public use without compensation.

That question under the then Federal Constitution was not a federal question.

Effect of Fourteenth Amendment.

All this has been changed by the terms of the Fourteenth Amendment, and federal questions have been created and limitations imposed upon State power that did not exist before.

Slaughter House cases, 16 Wall., 36.
Bartemeyer v. *Jones,* 18 Wall., 133.
Mugler v. *Kansas,* 123 U. S., 623.

"The Fourteenth Amendment, which was finally adopted "July 28th, 1868, largely expanded the power of the Federal "courts and Congress and for the first time authorized the "former to declare invalid all laws and judicial decisions of "the States abridging the rights of citizens or denying them the "benefit of due process of law."

Holden v. *Hardy,* 169 U. S., 382.

The cases of *Pound* v. *Turck,* 95 U. S., 459, and *Lake Shore & Mich. Southern Ry.* v. *Ohio,* 173 U. S., 285, also both turned upon the question of the conflict of the State statute with the change of the Federal Constitution empowering Congress to regulate commerce as in the case of *Leovy* v. *U. S.,* 177 U. S., 621.

There was no question in either of these cases of the effect of a contract or of the deprivation of property without compensation.

Public Right Involved

The contention of defendants below was that in view of the public character of the right involved in the contract, it was subject to impairment, *i. e.,* that the complainant entered into the contract with the knowledge that the State had the right by reason of its subject matter to discharge the defenders from its performance, and rely on the cases of *Legal Tender Cases,* 12 Wall., 551, and *Mitchell* v. *Clark,* 110 U. S., 633.

In those cases this court decided that where the abrogation of a contract was the indirect result of an act passed in pursu-

ance of some express constitutional power, as a bankrupt act discharging bankrupts from their debts—lodged by the Federal Constitution in Congress, all parties to the contract must be presumed to have contracted with a view to the possible exercise of this power.

The inapplicability of these cases to the present is clear:

1. The provision forbidding the impairment of contracts applies to the States, not to Congress.

"It is no answer to this to say that it interferes with the "validity of contracts for no provision of the Constitution of "the United States prohibited Congress from doing this, and it "does the States."

Mitchell v. *Clark*, 110 U. S., 643.

No State can pass a law discharging a bankrupt from all his debts.

2. If the contract was subject to impairment by an exercise of the police power, then there must be a valid, not a pretensive, exercise of that power.

A man can, if he chooses, for consideration, forego the exercise of a public right. He can bind himself not to carry on a lawful trade or calling within a particular locality. He can bind himself to forego the exercise of any right which shared in common with all other citizens of the State, is not one which, like the right of freedom or the ballot, is essential to the continuance and existence of society.

Oregon Steam Nav. Co. v. *Winsor*, 20 Wall., 64.
Hulse v. *Bonsack Mach. Co.*, 65 Fed. Rep., 867.
Printing Co. v. *Sampson*, L. R. 19 Eq., 462.

A contract not to practice law in a particular place is valid.

A contract not to practice medicine in a particular locality is valid.

A contract not to carry on a specified trade in a particular district is valid.

A contract not to engage in steam transportation on a particular river is valid.

Where an individual has for full consideration made a valid contract within one of the above categories, can the State, by a statute passed for the benefit of that particular individual, absolve him from the performance of his contract on the ground that the contract was on a matter of public right, and that the State, in the exercise of its police power, can dissolve all such contracts?

We submit such a proposition cannot be supported on any line of logical reasoning or by any adjudicated precedent.

QUESTIONS UNDER THE STATE CONSTITUTION.

1.

The Statute is Special Legislation.

The Constitution of South Carolina provides, Art. III, Section 34:

"The General Assembly of the State shall not enact local or "special laws concerning any of the following subjects, or for "any of the following purposes, to-wit:

* * * * * * *

"II. To lay out, open, alter or work roads or highways."

This provision has been construed by the Supreme Court of the State of South Carolina.

"In order that a law may be general, it must be of force in "every county in the State; and while it may contain special "provisions making its effect different in certain counties, those "counties cannot be exempt from its entire operation."

Dean v. *Spartanburg,* 59 S. C., 110.
State v. *Queen,* 62 S. C., 250.
Grocery Co. v. *Burnett,* 61 S. C., 211.

The Supreme Court of South Carolina has decided a navigable stream to be a highway—

Heyward v. *Chisolm,* 11 Rich., 263.

and it is so declared by the constitutional and statutory provisions already referred to.

The statute in question is not a general act, declaring under what circumstances creeks in the several counties may be closed, but is limited to one creek in one county for the benefit of two individuals.

2.

Private Statute Passed Without Notice.

It is admitted that this statute so greatly affecting the right of complainant was passed without notice to him.

It is equally admitted that at the time of its passage there was in existence a law forbidding its introduction into, and passage by the General Assembly of such an act without notice and publication.

(Sections 31 and 34 of the Code of Laws 1902, in appendix.)

The very object of such a law was to protect individuals in their rights by prohibiting the passage of measures injurious to those rights without proper notice to the parties to be affected.

It is true this was a statutory, not a constitutional, provision, but it was the *law*, and as the law, binding upon the General Assembly until repealed or changed in a valid and constitutional manner. The acts of the Legislature are the law, and bind every succeeding Legislature until legally altered.

This statute prohibiting the passage of such measures without notice is still the law. It has never been repealed.

We have the case here then presented of a statute claimed to be of force, which has been passed in direct and flagrant violation of the provisions of law existing at the time of its passage and still existing.

It is the rule in many States, as in this court, with regard to the acts of Congress, that the court cannot look behind the authentication by the proper officers of the General Assembly as to the passage of an act.

Such is not the rule in South Carolina.

There it has been held that the court can go behind the authentication of the act by the presiding officers of the houses and ascertain if the constitutional requirements for its passage had been observed.

State v. *Smalls,* 11 S. C., 262.
Bond Cases, 12 S. C., 200.
State v. *Chester,* 39 S. C., 307.

The demurrer admits that none of the necessary preliminaries for the introduction and passage of this act have been complied with.

It was passed through the legislature notwithstanding the existence of the law.

The question then is, has a statute regulating the method whereby legislation can be enacted no more effect than a mere rule of procedure?

The existing statute was no mere rule of either house. It was law, the result of the action of the entire legislature and approved by the governor. If being law it has no effect as law it would mean that it was useless to place it on the statute book.

It was a statute intended for the protection of the rights of property holders. It was a declaration to them that no special personal franchise or privilege would ever be granted by the State affecting their rights and property, save after full notice and an opportunity to be heard.

As a statutory declaration of that kind it entered into the element of vested rights in like manner as any other statute guaranteeing to the future purchaser of property security in his possession thereof.

HENRY A. M. SMITH,
Counsel for appellant.

APPENDIX.

Extract from the Statutes of South Carolina Code of Laws, 1902.

ARTICLE III.

INTRODUCTION OF MEASURES FOR PRIVATE PURPOSES.

Section 31. No bill to charter or incorporate, or to amend the charter of any society, company organization, or body politic of any kind, or for the granting of any privilege or immunity or for any other private purpose whatsoever, shall be introduced or entertained in either House of the General Assembly, except by petition, to be signed by the person or persons seeking to be incorporated, or by the corporators or their officers, or duly appointed agents, seeking an amendment of a charter, or by the

person or persons seeking such privilege, immunity or other private grant or relief. The petition must be accompanied in each instance by a draft of a bill or joint resolution, as the case may be, to charter or incorporate such society, organization or body politic, or to amend the charter thereof, or to grant the privilege or immunity, or to carry out the private purpose prayed for in said petition; and together with the said draft of the bill or joint resolution, shall be referred to some appropriate committee of the House in which such petition is presented, to be acted upon by such committee as hereinafter provided.

* * * * * * *

Section 34. In any case other than that of a charter or incorporation, the petition shall set forth fully and distinctly the merits and particulars of the case, and if the same shall in any wise affect the rights of others directly who reside in this State, such petition shall be accompanied with proof that the parties, so far as known, who may be affected merely, have had sixty (60) days' notice of the presentation of such petition, before such petition is presented, and also that notice of the intention of the petitioner or petitioners to make such application has been published in a newspaper having the largest circulation published in the county where the privilege or immunity is to be enjoyed, once a week for at least three weeks, the first of which publications shall be at least sixty (60) days before such petition is presented.

Supreme Court of the United States,

OCTOBER TERM, 1904.

No. 46.

ARTHUR M. MANIGAULT, APPELLANT,

vs.

A. A. SPRINGS AND ST. J. M. LACHICOTTE, COPARTNERS IN BUSINESS UNDER THE FIRM NAME OF S. M. WARD & COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

BRIEF OF ARGUMENT OF

THEODORE G. BARKER,
Solicitor for Defendants-Appellees.

STATEMENT.

The Transcript shows all the record of the proceedings in this cause, except the Notice of a Motion for Injunction, the hearing of said motion, and the decision and opinion of the Circuit Judge, filed 22d June, 1903, refusing the Injunction.

The decision and opinion of his Honor, Circuit Judge Simonton, appears in the *Federal Reporter, vol.* 123, *p.* 708, *et seq.*

As that opinion deals at length with most of the questions which are raised by the Assignments of Error, on this appeal (which appeal is taken from the subsequent judgment of the Circuit Court, sustaining the Demurrer of defendants to the bill, and dismissing the bill), the appellees crave reference to that opinion, for the benefit of the light which it throws upon this case.

The Circuit Court, in sustaining the Demurrer, entered the following judgment (Transcript, fol. 34):

"This case came on to be heard on bill and demurrer. After reading the pleadings and hearing counsel thereon, without passing upon first ground of demurrer, as it is not necessary in view of the opinion I entertain on the bill, it is

"Ordered, adjudged and decreed, that all the other grounds of demurrer be sustained and the bill be dismissed."

The Bill of Complaint, in this case, seeks, from a Federal Court, an Injunction, to prevent the execution of a work, which has been authorized by an Act of the Legislature of the State of South Carolina, viz: the erection of a Dam across Kinloch Creek, in Georgetown County, in said State.

The purpose of the work, as declared by the Legislature in the Act, was the improvement of a large body of agricultural land, subject to overflow by high tides and freshets, making it necessary to erect a dam across Kinloch Creek to shut out from the land the overflow of such tides and freshets.

Kinloch Creek is said, in the Act, to be situated entirely in the County of Georgetown, in said State, and the lands bordering on said stream are almost entirely owned or controlled by defendants. See Exhibit "C" to Bill of Complaint (Transcript, fol. 16).

ARGUMENT ON THE ERRORS ASSIGNED BY COMPLAINANT.

First Error Assigned.

"That the Court erred in sustaining the demurrer therein and dismissing the bill. (Transcript, fol. 36.)

This assignment of error fails to specify any ground of error and cannot, for want of specification, be discussed.

Second Error Assigned.

"2. *That the Court erred in not holding that the enacting of the statute of the General Assembly of the State of South Carolina, approved 3 March, 1903, annexed as Exhibit 'C' to the bill of complaint, was the passing by the State of South Carolina of a law impairing the obligation of a contract, by annulling or attempting to annul and avoid the contract and covenant entered into by the defendants herein, with the complainant, in and by their agreement under seal referred to in, and annexed, as Exhibit 'B,' to the bill of complaint herein, and that such statute of the State of South Carolina was the passing of a law in contravention of the provisions of Article I., Section 10, of the Constitution of the United States.*" (Transcript, fol. 36.)

The Act of the Legislature of South Carolina, referred to in above assignment of error and attacked by the bill of complaint, as violating the Constitution of the United States, is as follows (Transcript, fol. 16-17):

"AN ACT *to Authorize the Construction and Maintenance of a Dam across Kinloch Creek, in Georgetown County.*

"Whereas, in order to drain certain lowlands in the County of Georgetown, which lands are subject to overflow by reason of high tides and freshets in the Santee River, it has become necessary to construct a dam across Kinloch Creek;

"And whereas, said creek is situated entirely in Georgetown County, and the lands bordering on said stream are almost entirely owned or controlled by A. A. Springs and St. J. M. Lachicotte, copartners in business under the firm name of S. M. Ward & Co.;

"And whereas, by reason of the drainage and protection of said lands from overflow, their taxable value will be greatly enhanced, and without the dam provided for in this bill a large part of the land bordering on said creek will eventually become abandoned and valueless, as some portions of it now are;

"And whereas, it is the purpose of the said parties to construct a good and sufficient floodgate, so as to allow the water to pass out of said creek;

"And whereas, the erection of a dam across Kinloch Creek is the ony feasible and practicable scheme for the drainage of said lands;

"And whereas, in order to remove any doubt as to the authority of A. A. Springs and St. J. M. Lachicotte, copartners, doing business as S. M. Ward & Co., to erect, construct and maintain a dam across said 'Kinloch Creek,' now

"Be it enacted by the General Assembly of the State of South Carolina:

"Section 1. That the right, power and privilege to construct, erect and maintain a dam across said Kinloch Creek is hereby authorized, granted and given to said A. A. Springs and St. J. M. Lachicotte, copartners, doing business under the firm name of S. M. Ward & Co., their heirs and assigns and the survivors of them or either of them: *Provided,* That the said A. A. Springs and St. J. M. Lachicotte, copartners, doing business under the firm name of S. M. Ward & Co., shall be liable for all such damages as may be established in any Court of competent jurisdiction by any landowner claiming that his land has been damaged by reason of the erection of said dam."

Did the Circuit Court err in *not* holding that the above Act of the Legislature of South Carolina was "a law impairing the obligation of a contract, in violation of Article I., Section 10, of the Constitution of the United States?"

Circuit Judge Simonton, in refusing the injunction in this case, answered this question thus (123 Fed. Rep., p. 719):

"Assuming that the contract was valid, does the Act of the Legislature with regard to it come in conflict with the Constitution of the United States, in that it impairs the obligation of a contract? It must be noted that the Act of Assembly makes no mention of and no allusion to any contract whatever. Apparently the Act was passed in the exercise of legislative authority, and under the police power of the State. We cannot inquire, as has been seen, into the motive which may have controlled the Legislature. The doctrine of *omnia presumuntur* applies to its acts. Assuming, then, that this Act was passed in the exercise of the legitimate power of the State, the rule laid down in the *Legal Tender Cases,* 12 Wall., at page 551, applies to this Act. *'As in a State of civil society property of a citizen, or subject, is subject to the demands of the sovereign, so contracts must be understood as made in reference to the*

possible exercise of rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority.' So also, in *Mitchell* v. *Clark*, 110 U. S., 633, *'where the question of the power of Congress arises, it does not depend upon the incidental effects of its exercise on contracts, but on the existence of the power itself.'*

"It is well to examine this contract more minutely and ascertain precisely what it is. The defendants, without the authority of the State, in whom alone is the right to close a stream in this creek, had built a dam across Kinloch Creek, with a trunk and floodgate on each side thereof; the trunk and floodgate being on their own lands. The complainant and Mr. Ford objected. After notice of the objection and negotiations thereon, this contract was made. It is an indenture between these defendants, parties of the first part, and Manigault and Ford, parties of the second part. It recites that all the parties to the deed were owners of land on the Santee River, adjacent to or in the neighborhood of Kinloch Creek and White Oak Creek; that there are now—that is, at the date of the deed—banks across the said creeks, with a trunk on the bank across White Oak Creek, and a bank across Kinloch Creek, with a trunk and floodgate on each side thereof; that the parties of the second part claim that they have the right to keep open all the time and remove said bank and floodgate and trunks as obstacles to navigation, and to the free ingress and egress of the water, and to the parties themselves using the said creeks as highways, and that the parties of the first part object to such removal, and claim that they should not be removed. Then comes the consideration and the covenants. The important covenant is this:

" 'First. That from and after the 31st December, 1898, the said parties of the second part, Manigault and Ford, their agents, servants and employees, shall have the right to open and keep open all or any part of the said banks and trunks over and across the said two creeks, and to remove all or any part of the said banks and obstructions across the said creeks, so as entirely or to such an extent as they may see fit, to free and clear off said creeks, or either of them, from all or any part of such obstructions, without let, hindrance, objection, delay or molestation whatsoever, in act or procurement, by the parties of the first part, their servants, agents or employees.'

"Now this contract speaks of the then existing claim of right by the complainant and Ford to the removal of the then existing obstructions, and of the covenant of the defendants to remove the same. They were put up by defendants under a

claim of right in themselves to do this. This claim was abandoned and the obstructions in due time were thoroughly removed, without any let, hindrance, objection, delay or molestation by the parties of the first part whatsoever, or any of their servants, agents or employees. Has not this contract been performed? All that it binds the parties to do has been done. The obstruction has been entirely removed. Nothing is said of the future. But good faith requires that Ward & Company should not, having entered into this contract, proceed to repeat what Manigault and Ford complained of. They would subject themselves to the same proceedings, perhaps be met at once with an indictment for a nuisance. But, having abandoned all claim, in their own right, to erect such a dam, it does not prevent them from using, indeed from seeking, a legal authority for the erection of a dam. Their previous act being unlawful, they were exposed to a prosecution, or for damages.

"Now, however, the State has come in, and, by the exercise of her police power, has sanctioned the construction of the dam. The action of the defendants is no longer unlawful. The State has made it lawful; and, under the authorities quoted above, if the contract forbid a renewal of the erection of the dam, this did not preclude or prevent or include the acts of the State."

In *Charles River Bridge* v. *Warren Bridge,* 11 Peters, 419, where the claim was that a charter granted by the State to the Warren Bridge divested rights previously vested in the Charles River Bridge by its charter, *Justice McLean,* delivering the opinion of the Court, said:

"In all cases where private property is taken by the State for public use, the action is on the property, and the power, if it exists in the State, must be above the contract. It does not act on the contract, but takes from under it vested rights. And this power when exercised by a State does not in the sense of the Federal Constitution impair the obligation of the contract."

It will be noted that this was said of a grant, or contract, between the State herself and her grantee, creating vested rights in the latter. If even such a contract was not impaired by the subsequent exercise of "the rightful authority of government," divesting such vested rights, *a fortiori,* would a contract between private persons not be impaired by a law passed in the exercise by the State of her "legitimate authority." Such a law must, still more than in a case of the State's own

grant, be "above the contract," and must be held "not to act on the contract" at all.

Therefore the Act of the General Assembly of the State of South Carolina, approved March 3, 1903, authorizing the erection of a dam across Kinloch Creek, a stream wholly within her own borders, could not, and did not, impair the obligation of, or annul, or attempt to annul and avoid, "the contract and covenant," which had been, in 1898, entered into by the defendants with the complainants, and there was no error in the Circuit Court in holding that the Act did not operate on the contract at all, did not annul or avoid it, and was not a violation of the Constitution of the United States.

Third Error Assigned.

"3. *That the Court erred in not holding that the provisions of the Constitution of South Carolina declaring that all navigable waters should forever remain public highways was a right and privilege annexed to and constituting a part of the value of the lands and properties of the complainant, situated upon such navigable waters, and that the damming of Kinloch Creek, and its consequent closing as a navigable water highway, except for the purposes of the public health, the public welfare or the public safety, and after due compensation therefor, is a destruction of part of the value of the property of the complainant, given to him at the time of his acquisition thereof by the Constitution and laws of the State of South Carolina; and the passage of the said statute by the General Assembly of the State of South Carolina was an impairment of the obligation of the contract so entered into by the complainant when he was permitted to acquire said property, and is the taking of the property of the complainant without compensation therefor, and the depriving of the complainant of his property without due process of law, in contravention of Section* 1, *of Article XIV., of the Amendments of the Constitution of the United States.*" (Transcript, fol. 37.)

The fallacies contained in this assignment of error lie in the assumptions:

A. That Kinloch Creek is "a public highway;"

B. That "the provisions of the Constitution of South Carolina declaring that all navigable waters should forever remain public highways, was a right and privilege annexed to and

constituting a part of the value of the land and properties of the complainant, situated upon such navigable waters;"

C. That the damming of Kinloch Creek and its consequent closing as a navigable water highway, * * * is a destruction of part of the value of the property of the complainant;

D. That such alleged property was given to complainant by the Constitution and laws of the State of South Carolina, at the time of his acquisition thereof;

E. That a contract was so entered into by the complainant with the State of South Carolina when he was permitted to acquire said property;

F. That the passage by the Legislature of South Carolina of an Act authorizing the erection of a dam across Kinloch Creek was an impairment by the State of South Carolina of the obligation of the contract so alleged to have been entered into by the State with the complainant, when he was permitted to acquire said property;

G. That the passage of said statute is the taking of the property of the complainant without compensation therefor and the depriving of the complainant of his property without due process of law; and

H. That the closing of Kinloch Creek was not for the purpose "of the public welfare."

A.

Was Kinloch Creek "a navigable water highway?"

Circuit Judge Simonton, in deciding against complainant's motion for injunction in this case (*Manigault* v. *Ward & Co.*, 123 Fed. Rep., 708), deals with this question (on p. 712) thus:

"Is Kinloch Creek a navigable water of the United States or navigable under the laws of South Carolina? The distinction between these classes is seen in the *Montello*, 11 Wall., 411, * * * In order to make a stream navigable by the public it is not enought that it is floatable, that is, capable of floating vessels or other craft; it must be a public highway. To be a public highway it must have a terminus, *a quo* the public can enter it, and a terminus, *ad quem they can leave it.* (*Young* v. *Culbertson*, 1 MacQ. H. L. Cases, 453.) * * * On p. 714, it is said: 'Kinloch Creek, beyond this canal, loses itself in the land.' So there is no *terminus ad quem* for the public after entering it from the Santee, and it certainly is not a navigable

water of the United States. Is it a highway under the law of South Carolina? In Section 1335, Civil Code of South Carolina, it is declared, '*that all streams which have been rendered or can hereafter be rendered capable of being navigable, by rafts of lumber or timber by the removal of accidental obstructions, and all navigable water courses and cuts, are hereby declared to be navigable streams, and such streams shall be common highways and forever free as well as to the inhabitants of this State as to the citizens of the United States, without any taxes, etc.,*' as in the language of the Constitution above quoted. This Act does not change the definition of what are navigable waters. It only emphasizes the law already declared, that navigability does not depend upon the depth or width of a stream, nor upon the ebb and flow of the tide therein. It makes no new law, it declares the law."

B., C., D., E. and F.

Was "the provisions of the Constitution of South Carolina, declaring that all navigable waters should forever remain public highways," a right and privilege annexed to * * * "the lands and properties of the complainant situated upon such navigable waters?" and was "the damming of Kinloch Creek and its consequent closing as a navigable water highway * * * a destruction of part of the property of the complainant, given to him at the time of his acquisition thereof by the Constitution and laws of the State of South Carolina?"

It needs no elaboration of argument or authority to disprove the fallacy, that the general provisions of the Constitution of a State are or can become as against the State a right or privilege of an individual or be annexed to the land and properties of a private idividual, so as to become "part of his property," or that the right to such provision was given to him by the Constitution and laws at the time of his acquisition of his land, or the further fallacy, that such fancied right and privilege, so claimed to be annexed as an appurtenance to his land, are by force of such annexation protected to the owner as against the State by a contract obligation binding the State and restricting her in the exercise of her sovereignty.

That such declarations of the general law do not constitute a contract between the State and any of its citizens; that the general provisions of a State Constitution are not and cannot

become, as against the State, annexed to the land and properties of a private individual so as to become "part of his property;" that the right to such provisions are not "given to him by the Constitution and laws at the time of the acquisition of his land," and that such supposed right and privilege are not, by force of such supposed annexation to his property, protected to the owner by a contract obligation, binding the State and restricting her in the exercise of her sovereignty, is distinctly ruled, in principle, by this Court in the early case of *Jackson* v. *Lamphire*, 3 Peters, *280 (173), *decided in* 1830.

In that case counsel contended that an Act of the Legislature of the State of New York violated the provisions of the Constitution of that State, "which ordains, that 'the Legislature of this State shall at no time hereafter institute any new court or courts but such as shall proceed according to the course of the common law,'" and violated also that article of the State Constitution which ordained 'that a trial by jury, in all cases in which it hath heretofore been used in the Colony of New York, shall be established and remain inviolate forever,' and that, "for these violations of the State Constitution, as on general principles, the statute complained of was a statute which impaired the obligation of contracts," but the Court say:

"The plaintiff insists that the patent to John Cornelius creates a contract with the grantee, his heirs and assigns, that he should enjoy the land therein granted free from any legislative regulations to be made in violation of the Constitution of the State; that the Act in question does violate some of its provisions, and therefore impairs the obligation of the contract.

"The Court are not inclined to adopt this reasoning, or to consider this, as fairly coming within the clause of the Constitution relied on by the plaintiff. The only contract made by the State is a grant to John Cornelius, his heirs and assigns, of the land in question; the patent contains no covenant to do or not to do any further act in relation to the land, and we do not, in this case, feel at liberty to create one by implication. The State has not by this Act impaired the force of the grant. * * * Presuming that the laws of New York authorized a soldier to convey his bounty land, before receiving a patent, and that, at the date of the deeds, there was no law compelling the grantee to record them, they would take priority from that

date. This is the legal result of the deeds, but there is no contract on the part of the State that the priority of title shall depend solely on the principles of the common law, or that the State shall pass no law imposing on a grantee the performance of acts which were not necessary to the legal operation of his deed at the time it was delivered. It is within the undoubted power of the State Legislature to pass recording Acts, by which the elder grantee shall be postponed to a younger, if the prior deed be not recorded within the limited time, and the power is the same whether the deed is dated before or after the passage of the Act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts; such too is the power to pass Acts of limitations and their effect. * * * Whether it is considered as an Act of limitatons, or one in the nature of a recording Act, or as a law *sui generis*, called for *by the public situation of that part of the State*, we are unanimously of opinion that it is not a law which impairs the obligation of a contract." (3 Peters, 280.)

It has been repeatedly held in cases, in which this Court has time and again refused to entertain jurisdiction of the question of the constitutionality of State legislation, closing or changing the course of a navigable stream, wholly within the borders of a State, that the authority of the State government over such navigable streams for the purposes of public improvements is to be respected as essential to the welfare of the community and to the rights of the States; and it has also been held, that the surrender by the State of such authority, or of any power of the like character, can never be implied or presumed, but must be so clearly expressed as to admit of no doubt.

In *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 420, it was said:

"The object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. * * * A State ought never to be presumed to surrender this power * * * and when a corporation alleges that a State has surrendered for seventy years its power of improvement and public accommodation * * * the community have a right to insist, in the language of this Court (Chief

Justice Marshall in *Providence Bank* v. *Billings*, 4 Pet., 514), that 'its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.' The continued existence of a government would be of no great value if by implications and presumptions it was disarmed of the powers necessary to accomplish the end of its creation. * * * The rule of construction announced by the Court was not confined to the taxing power, nor is it so limited in the opinion delivered; on the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving undiminished the power then in question; and" (italics ours) *"whenever any power of the State is said to be surrendered or diminished*, whether it be the taxing power, *or any other affecting the public interest*, the same principle applies, and the rule of construction must be the same."

It was contended on Circuit, by counsel for appellant, and we suppose it will be re-asserted here, that the complainant had, as riparian proprietor on navigable waters in the vicinity of Kinloch Creek, a vested right to have Kinloch Creek kept open; that the State, by the provision in the general law declaring that navigable waters shall forever remain public highways, has resigned to the riparian proprietor its power over navigable streams; and that a contract between the State and such riparian proprietor, that the State would never close Kinloch Creek, was to be implied from such declaration; but, in the *Charles River Bridge* case, the Court said:

"Amid the multitude of cases which have occurred and have been daily occurring for the last forty or fifty years, this is the first instance in which such an implied contract has been contended for. * * * The Court cannot deal thus with the rights reserved to the States; and, by legal intendments and mere technical reasoning, take from them any portion of *that power over their own internal police and improvement which is so necessary to their wellbeing and prosperity.*" (Italics ours.)

In *Bird* v. *Smith* (Penn., 8 Watts, 434), 34 Am. Dec., 484, it was held, that

"Over the surface of a public river riparian owners have no peculiar right. Such is the principle of *Carson* v. *Blazer*, 2 Binn., 475; S. C., 4 Am. Dec., 463, and *Shrunk* v. *The Schuylkill Navigation Company*, 14 Serg. & R., 71, which seem to

have put the public right of navigation and fishery on the same footing. * * *"

In *Atkinson* v. *Philadelphia and Trenton R. R. Co.*, 2 Peters, 252, Note 1; *Field* v. *Same*. Bills on the equity side of the Court praying injunction to restrain defendant from erecting a bridge over the Neshaminy Creek, being constructed under color of an Act of Assembly to the great injury of plaintiff.

Atkinson alleged that he is a citizen of New Jersey, employed in transporting articles by water to and from different places, owning five schooners; that he had recently in the course of such business made a contract with Anthony Taylor, who resides on the Neshaminy River, in Bucks County, Pa., to deliver to him 1,000 bushels of lime at his wharf, about two miles from the mouth of said river, which is by law a public navigable river or highway for the free passage of vessels up and down the same. That defendants, under color of an Act of Assembly of this State, * * * are about to construct a permanent bridge across said stream near its mouth, where it is navigable for sea vessels, and thence to the farm of said Taylor. * * * That, neither by the laws of Pennsylvania, nor the Constitution of the United States, can any obstruction be placed across said stream; that it is contrary to law to interfere with the full free navigation thereof, for the accommodation of the inhabitants on said river as well as all the citizens of the United States who may have occasion to pass and repass on the same with any masted vessels. That the Act of the Legislature gives no authority to erect such a bridge * * * or any bridge which shall in any way impede the full and free navigation of said river, and complainants asked an injunction to restrain such erection.'

The Court, by *Baldwin, Justice,* say:

"The complainant asserts no right of property in the bank or the bed of the river; his claim to the interposition of the Court rests on his contract with Mr. Taylor for the delivery of 1,000 bushels of lime at his wharf above the contemplated bridge, and on the common right of navigation resulting from the Act of Assembly declaring the Neshaminy a public navigable river. * * *

"Laws in relation to roads, bridges, rivers and other public

highways, which do not take away private rights of property, may be passed at the discretion of the Legislature, however much they may affect common rights. * * *

"The injuries to be compensated are those which are done *to property immediately.* * * *

"Compensation shall be made for all damages for immediate injury to property, but not for any damage, where there is no legal injury, which is called *damnum absque injuria*—as the loss of a fishery. * * * No property has been taken from him; he had no property in the fish, or the river. * * * We must consider these adjudications of the Supreme Court of the State as establishing the general principle that the right to the use of the navigable streams, which are public highways, either for fishing or navigation, is subordinate to laws, which regulate its general public and internal concerns, and that *no common right in the common property is considered as private property,* or *the subject of individual ownership.*" (The italics are ours.) "No case has yet occurred in which an injunction has been granted in favor of an individual who claims only *a common right, in which he can have no private property;* nor can we conceive one in which it would be justified, unless it was accompanied with an obstruction or destruction of private property. The injury, too, must be what is deemed in equity as irremediable, a permanent appropriation of the property of the complainant to the use of the defendants, a destruction or total loss consequent on the act to be done, * * * if the injury is susceptible of perfect pecuniary compensation, if the ordinary legal remedy in Courts of law can afford adequate satisfaction, it is not in the sense of the law irreparable; 'it must reach to the very substance and value of the estate going to its destruction in the character in which it is enjoyed.'"

G.

The assignment of error with which we are dealing assumes that the closing by the State of Kinloch Creek by the erection of a dam across it and the cutting off from the complainant as one of the public the navigation of said creek, was "the taking of his property, and asserts that such taking was without compensation therefor.

We have shown, by authority, that complainant had no such property; that there was no such taking of his property in contemplation of law; but even if it could be so construed, the State, in closing Kinloch Creek, did not leave complainant

without protection or compensation for whatever damage or injury he might suffer thereby. The Act expressly provides that defendants, the parties who might be benefited directly by the improvement and to whom the right to erect and maintain the dam is granted, shall be liable for all such damages as may be established in any Court of competent jurisdiction by any land-owner claiming that his land has been damaged by reason of the erection of said dam.

H.

The last of complainant's erroneous assumptions to be noticed in his *third* assignment of error, is, that the closing of Kinloch Creek by the State was not "for the purpose of the public welfare."

The Act of Assembly (Transcript, fol. 16) declares in its Preamble:

"Whereas, in order to drain certain lands in the County of Georgetown, which lands are subject to overflow by reason of high tides and freshets in the Santee River, it has become necessary to construct a dam across Kinloch Creek; * * *

"And whereas, by reason of the drainage and protection of said lands from overflow, their taxable value will be greatly enhanced, and, without the dam provided for in this bill, a large part of the land bordering on said creek will eventually become abandoned and valueless, as some portions of it now are. * * *"

Here is a plain declaration of the Legislature that the erection of the dam was for the purpose of the public welfare, which would be secured by reclaiming a body of lowlands and enhancing their taxable value, thus adding to the wealth and prosperity of the State.

That it would tend to benefit also the individual land-owners, who would bear the cost of erecting and maintaining the dam, in no wise detracted from the benefit which the Legislature of the State in its wisdom decided would accrue to the public from the improvement.

Fourth Error Assigned.

"4. *That the Court erred in not holding that the complainant, as the owner of property abutting on a navigable stream,*

to wit: Kinloch Creek, had, as part of his private property, the right of riparian owner, to wit: the right of unobstructed passage to and from his said property on and over the waters of Kinloch Creek, and that the closing of Kinloch Creek by the passage of the said statute, and the loss of access thereby to the property of the complainant and the consequent damage to the lands of the complainant abutting on or contiguous to said Kinloch Creek, is the taking of the (property of the) complainant without his consent, and without compensation therefor, in contravention of the provisions of Article I., Section 10, of the Constitution of the United States, and of Section 1, of Article XIV., of the Amendments to the Constitution of the United States, and of Section 17, Article I., of the Constitution of South Carolina." (Transcript, fol. 37.)

Is the complainant a riparian owner on Kinloch Creek?

The Act of the General Assembly of the State of South Carolina, which appears in the *Transcript* (*folio* 16), as *"Exhibit C"* to the Bill of Complaint, states that "the lands bordering on said stream are almost entirely owned or controlled by" the defendants, and no other persons are mentioned as riparian owners on Kinloch Creek.

Again, the "diagram" (*Transcript, fol.* 11), annexed to the Bill of Complaint, as "Exhibit A," shows the "lands of A. M. Manigault" (the complainant) as lying on Minim Creek, into which Kinloch Creek coming from above, empties, the mouth of Kinloch Creek being in Minim Creek, above the red line which marks the boundary of the lands of complainant, A. M. Manigault. The utmost that can be said, from the diagram of complainant, is, that the mouth of Kinloch Creek is in Minim Creek, opposite to the "lands of A. M. Manigault." This does not put the lands of Manigault, at any point, on the banks of Kinloch Creek, or constitute complainant a riparian owner on Kinloch Creek. To reach Kinloch Creek, complainant, Manigault, according to his own diagram, must leave his lands on the left bank of Minim Creek, and crossing that stream, enter the mouth of Kinloch Creek, between the lands of *defendants* on either bank of Kinloch Creek. The lettering on the diagram is accidentally so placed as make the right bank of Kinloch Creek seem to stretch down to the Santee River at the mouth of Minim Creek, by the the letters

"Ki" in the word *"Kinloch"* being placed below the junction of Kinloch Creek and Minim Creek, and below the mouth of Kinloch Creek, while the left bank of Kinloch Creek ends at Minim Creek. The fact being that after Kinloch Creek reaches and empties into Minim Creek, Kinloch Creek ends, and the banks of the stream, below that point, are the banks of Minim and not of Kinloch Creek. The complainant is a riparian owner of lands "abutting on" Minim Creek, but not a riparian owner of lands "abutting" on Kinloch Creek. He has no right of riparian ownership on Kinloch Creek. His right of riparian ownership, which he claims as "part of his private property," is on Minim Creek. His right to the unobstructed passage to and from his property on Minim Creek is on and over the water of Minim Creek, and that right is unobstructed.

We have already shown, however, that riparian ownership gives no property in the stream or over the surface, and that "no common right in the common property is considered private property or the subject of individual ownership." (*Atkinson* v. *Phila., &c., R. R. Co.*, 2 Peters, 252; *Bird* v. *Smith, supra.*) The right of navigation which complainant claims in the water of Kinloch Creek is only that to which he would have been entitled as one of the public. It follows that "the closing of Kinloch Creek" by the passage of the said statute was *not* "the taking of the property of the complainant without his consent, and without compensation therefor;" that it was *not* "in contravention of the provisions of Article I., of Section 10, of the Constitution of the United States," or of Section 1, of Article XIV., of the Amendments to the Constitution of the United States * * *" as alleged in the assignment of error.

JURISDICTION.

The 4th, 5th, 6th, 7th and 8th assignments of error attempt to raise questions whether the statute passed by the State of South Carolina, approved March 3, 1903, for stopping Kinloch Creek by a dam, violated the Constitution and laws of that State.

Those questions give no foundation for the jurisdiction of the Federal Courts in this case.

Whether the statute authorizing the erection of a dam across Kinloch Creek, lying wholly within the County of Georgetown, in the State of South Carolina, was or was not "in contravention of Section 17, Article I., of the Constitution of South Carolina;" whether or not it was "a statute passed for the private purposes of the defendants;" whether it was "not a statute passed in the exercise of any of the police powers of the State for the public health, the public welfare or the public safety, or for any public purpose whatever;" whether or not "the enactment of the aforesaid statute, approved March 3, 1903, by the General Assembly of the State of South Carolina, was the enacting of a local and special law, concerning the opening of highways," and was or was not in contravention of Article III., Section 34, Subdivision II., of the Constitution of the State of South Carolina; and was or was not in contravention of Article III., Section 34, Subdivision XI., of the Constitution of the State of South Carolina; and whether or not the passage of said statute was in contravention of the Code of Laws or of the Revised Statutes of South Carolina, are all questions which belong wholly to the Legislature and to the Courts of that State, and are not matters of which the Courts of the United States will entertain jurisdiction.

This doctrine has been maintained with conspicuous emphasis in an unbroken line of decisions from the *Blackbird Creek Marsh Company* case, in 2 Peters, down to the case of *McCain* v. *Des Moines,* 174 U. S., and cases still more recent.

In *Thompson Willson* v. *Blackbird Creek Marsh Co.,* 2 Peters, 244 (245), Chief Justice Marshall, delivering the opinion of this Court, said:

"The Act of Assembly of the State of Delaware, by which the construction of the dam erected by plaintiffs was authorized, shows plainly that this is one of those many creeks passing through a deep, level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property must be much enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved; measures calculated to produce these objects, provided they do not come in collision with the powers of the general government, are undoubtedly within those which are reserved to the States. But the measure authorized by the Act stops a naviga-

ble creek, and must be supposed to abridge the rights of those who have been accustomed to use it; this abridgement, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this Court can take no cognizance."

The *Blackbird Marsh* case was soon followed by that of *Atkinson* v. *Philadelphia & Trenton R. R. Co.,* reported in the same volume (2 Peters, 252, Note 1), which we have cited above on another point, and in which this Court declared that

"State laws on the subject of turnpike roads, fences, bridges, etc., are a part of the system of internal commerce and police of the respective States, the regulation of which they have reserved to themselves without any control by Congress (9 Wheaton, 208; 2 Ib., 443; 9 Johns., 560, 564, 573; 4 Wash. C. C., 378; *Bennett* v. *Boggs,* Bald., 60); and no law on these subjects is prohibited by the Constitution of the United States, unless it impairs the obligation of a contract. (2 Pet., 410.) * *

"The Legislature had the power to authorize the erection of a dam or causeway which would stop the navigation, if in their opinion it was conducive to the public welfare; whether it would be a discreet exercise of their power is not for this Court to decide, as the whole subject is clearly within their discretion, which the judicial power cannot control. (3 Pet., 412; 4 Ib., 593-4; 4 Wheat., 428; 8 Pet., 729.) * * *

"We can take no judicial cognizance of any special injury by any citizen of this State or any general inconvenience to which the people on the Neshaminy or its vicinity may be subjected on account of the bridge; those are exclusively the subjects of the judicial cognizance of the Courts of the State. * * *"

In *Charles River Bridge* v. *Warren Bridge,* 11 Peters, 419, *McLean, Justice* (speaking of the power of the State to take private property), said:

"Is there any power that can control the exercise of this discretion by the Legislature? I know of none, either in the State or out of it; but it must be exercised in subordination to the provisions of the State Constitution. And if not so exercised, the judicial authority of the State, only, between its own citizens, can interfere and prevent the wrong or repair it in damages. * * *

"If to take private property impairs the obligation of the contract under which it is held, this Court may be called on to determine, in almost every case, where the power is exer-

cised, as well when compensation is made as when it is not made. For if this Court can take jurisdiction on this ground, every individual whose property is taken has a constitutional right to the judgment of this Court, whether compensation has been made in the mode prescribed by the Constitution of the State. * * * To revise these cases would carve out for this Court a jurisdiction not contemplated by the Constitution and which cannot safely be exercised."

In *Jackson* v. *Lamphire* (1830), 3 Pet., *280 (173), it was held that, under the 25th Section of the Judiciary Act (1 Stat. at Large, 85):

"This Court cannot declare an Act of the State Legislature void because it conflicts with the Constitution of the State."

In *Medbury* v. *Ohio,* 24 How., 413, this Court said:

"The only question presented to the" (Ohio Supreme) "Court and decided by them, was whether the provisions of the Act of 1845 were consistent with the new Constitution.

"This is a question of which this Court can take no judicial cognizance."

In *Porter* v. *Foley,* 24 How., 415, held:

"The chief and only question in this case was whether an Act of Assembly of Kentucky * * * was a valid exercise of power by the Legislature. * * *

"The Supreme Court of Kentucky decided that it had such power under the Constitution of the State, and it is abundantly evident that there is no article or clause of the Constitution of the United States which could interfere with it."

In *Withers* v. *Buckley,* 20 How., 84, held, that

"Where it is alleged that the Constitution of a State declares that private property shall not be taken for public uses, and that the highest Court of the State has sustained the validity of a law which violates this constitutional provision, this Court has no power to review that decision.

"The 5th Article of the Amendment of the Constitution of the United States was inteded to prevent the government of the United States from taking private property for public use without compensation, and was not intended as a restraint upon the State governments. * * *

"A law of the State of Mississippi, which diverted a stream from plaintiff's land, 'which stream plaintiff and his grantors have ever enjoyed, and used the water flowing through his and their land for agricultural and domestic purposes and for navi-

gation and in transporting their crops to market and receiving their supplies therefrom. * * *'

"Bill of complaint charged that the law of Mississippi was invalid in not providing compensation for the injuries to him, in violation of the Constitution of the State and United States and of the Act of Congress of March, 1817, which authorized the people of Mississippi to form a Constitution, and of the Ordinance of 1817, passed in pursuance of the Act of Congress, 'both the Act of Congress and the Ordinance providing that the Mississippi River and the navigable rivers leading into the same shall be common highways and forever free as well to the inhabitants of Mississippi as to the other citizens of the United States.' "

Mr. Justice Daniel, delivering the opinion of the Court, said:

"The Act of Congress of March 1, 1817, in prescribing the free navigation of the Mississippi and the navigable waters flowing into it could not have been designed to inhibit the power, inseparable from every sovereign and efficient government, to devise and execute measures for the improvement of the State, although such measures might induce or render necessary changes in the channels or courses of rivers, in the interest of the State, or might be productive of changes in the value of private property. Such consequences are not infrequently and indeed inevitably incident to public and general measures, highly promotive of and absolutely necessary for the public good. * * *

"The Act of the Legislature of Mississippi therefore is strictly within the legitimate and essential powers of the State, is in violation neither of the Constitution nor laws of the United States, and presents no conjunction or aspect by which this Court would be warranted to supervise or control the decree of the High Court of Errors and Appeals of Mississippi."

The State of Pennsylvania and Wheeling and Belmont Bridge Co., 18 How., 421, held:

"In respect to these purely internal streams of a State, the public right of navigation is, exclusively, under the control and regulation of the State Legislature; and in cases where these erections or obstructions to the navigation are constructed under a law of the State, or sanctioned by legislative authority, they are neither public nuisance, subject to abatement, nor is the individual who may have sustained special damage entitled to any remedy for his loss. So far as the public stream is con-

cerned, the Legislature having the power to control and regulate it, the statute authorizing the structure makes it lawful. (5 Wend., 448, 449; 15 Ib., 113; 17 T. R., 195; 20 Ib., 90-101; 5 Cow., 165.)"

Lake Shore and Michigan Railway v. *Ohio* (1896), 165 U. S., 365:

"That full power resides in the State, as to the erection of bridges and other public works in navigable streams, wholly within their jurisdiction, in the absence of the exercise by Congress of authority to the contrary, is conclusively determined," citing *Willson* v. *Blackbird Creek Co.*, 2 Pet., 245; *Withers* v. *Buckley*, 20 How., 84; *Cardwell* v. *American Bridge Co.*, 113 U. S., 205; *Wilamette Bridge Co.* v. *Hatch*, 125 U. S., 1; *Shively* v. *Bowlby*, 152 U. S., 1 (and authorities therein cited).

Sennot v. *Davenport*, 22 How., 244:

"State laws have always been upheld by this Court, except where they were in conflict, or were adjudged by the Court to be in conflict, with the Acts of Congress," citing 2 Woodbury's Writings, 221; Woodbury and Minot's Rep., 401-451; 12 Wheaton, 441; 3 How., 230; *Milner* v. *R. R. Co.*, 6 Am. L. Rep., 9.

Transportation Co. v. *Chicago*, 99 U. S., 635:

"A Legislature may and often does authorize and even direct acts to be done which are harmful to individuals, and which without the authority would be nuisances. * * * An abridgement of the right of those who have been accustomed to use them, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of the State and its citizens, of which this Court can take no cognizance. *Willson* v. *Blackbird Creek Co.*, 2 Peters, 250. In numerous instances States have authorized obstructions in navigable streams."

Pound v. *Turk*, 95 U. S., 459:

"1. In the absence of legislation by Congress bearing on the case, a statute of a State, which authorizes a dam across a navigable river, which is wholly within her limits, is not unconstitutional.

"2. A party is not liable for obstructing the navigation of the river by means of a dam which he has erected under the authority and pursuant to the requirements of such a statute."

Mr. Justice Miller, delivering the opinion of the Court, said:

"The Blackbird Creek case (2 Pet., 245) is directly appli-

cable to the one before us, and, as it has never been overruled, but, on the contrary, though much criticised, has always been sustained, it is alone sufficient to control this one."

Cites *Cooly* v. *Board of Wardens,* 12 How., 299; *Willson* v. *Blackbird Creek Co.,* 2 Pet., 245; *Gilman* v. *Philadelphia,* 3 Wall., 713; *Crandall* v. *State of Nevada,* 6 Wall., 35.

In *Caldwell* v. *Bridge Company,* 113 U. S., 205, the doctrine that in the absence of legislation by Congress a State may authorize a navigable stream within its limits to be obstructed by a bridge, etc., is reasserted and the previous cases to that effect affirmed.

There was a bill in equity to enjoin maintenance of a bridge. A demurrer to the bill was sustained and the bill dismissed.

Previous cases cited and affirmed, viz: those cited above in *Pond* v. *Turk;* also *Escabana* v. *Chicago,* 107 U. S., 178, and *Miller* v. *Mayor of New York,* 109 U. S., 385.

Miller v. *Mayor of New York et al.,* 109 U. S., 385, held:

"The bridge being constructed in accordance with the legislation of both the State and Federal governments, must be deemed a lawful structure; * * * and however much it may interfere with the public right of navigation in the East River, and thereby affect the profits or business of private persons, it cannot on that ground be the subject of complaint before the Courts. * * *

"The plaintiff" (p. 395) "is not deprived of his property, nor of the enjoyment of it; nor does he from that cause suffer any damage different in character from the rest of the public."

After citing and approving the ruling in the *Wheeling Bridge* case (18 How., 430), the Court say:

"The case of *Gilman* v. *Philadelphia,* 3 Wall., 713, is much stronger than the *Wheeling Bridge* case, and is conclusive against the pretensions of the plaintiff. It there appeared that a bridge was about to be built over the Schuylkill River, and under the authority of an Act of the Legislature of Pennsylvania, when a party owning valuable coal wharves, just above Chestnut street, filed a bill to prevent its erection, alleging, as in the present case, that it would be an unlawful obstruction to the navigation of the river, and would be a public nuisance, inflicting upon him special damage, and claiming that he was entitled to be protected by an injunction to restrain the progress of the work, and to a decree of abatement should it be completed. The river was tide-water, and navigable to the wharves

of plaintiff by vessels drawing from 18 to 20 feet of water; and, for years, commerce to them had been carried on in all kinds of vessels. The bridge was to be only 20 feet high, and without draws, and of course would cut off all ascent above it of vessels carrying masts. The city justified its intended action under the Act of the Legislature. * * * The Court below dismissed the bill, and this Court affirmed its decree, holding that, as the river was wholly within her limits, the State could authorize the construction of a bridge, until Congress should by appropriate legislation interfere and assume control of the subject."

The case of *Escabana Co.* v. *Chicago*, 107 U. S., 678, follows the decision in *Gilman* v. *Philadelphia*, and is equally pointed and decisive.

Leovy v. *United States*, 177 U. S., 621 (1899), held that

"Subject to the paramount jurisdiction of Congress over the navigable waters of the United States, the State of Louisiana * * * had full power to authorize the construction and maintenance of levees, drains and other structures necessary and suitable to reclaim swamp and overflowed lands within her limits.

"The dam constructed by the plaintiff in error at Red Pass was constructed under the police power of the State and within the terms and purposes of the grant by Congress."

Mr. Justice Shiras, in delivering the opinion of the Court, said:

"We think therefore that we are warranted in regarding the dam in question as constructed under the police power of the State, and within the terms and purposes of the grant by Congress. There was evidence tending to show the character of the country affected by floods from Red Pass—that it was swamp land and sea marsh from the Mississippi River to the Gulf. The testimony showed that the closing of this pass has resulted in the redemption of large tracts of land, greatly increasing their value; * * * and that if those passes are kept closed for five years more it will be worth three times as much, and that if this pass be opened again by the removal of the dam, the Orange property will be ruined. * * *"

After citing *Withers* v. *Buckley*, 20 How., 84, the Court quoted the following from *Barbier* v. *Conolly*, 113 U. S., 27:

"Neither the Fourteenth Amendment, broad and comprehensive as it is, nor any other Amendment, was designed to

interfere with the power of the State, sometimes termed its 'police power,' to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."

The Sixth and Seventh Assignments of Error.

"6. That the Court erred in not holding that the enactment of the aforesaid statute, approved March 3, 1903, by the General Assembly of the State of South Carolina, was the enacting of a local and special law, concerning the opening of highways, and was in contravention of Article III., Section 34, Subdivision II., of the Constitution of South Carolina.

"7. That the Court erred in not holding that the enactment of the aforesaid statue, approved March 3, 1903, by the General Assembly of South Carolina, was the enacting of a local and special law, and was in contravention of Article III., Section 34, Subdivision XI., of the Constitution of the State of South Carolina." (Transcript, fol. 38.)

These assignments present no Federal question. They involve matters which belong exclusively to the jurisdiction of the State Courts. They repeat the like points taken in the bill, which might have been disregarded by the Circuit Judge on the motion for injunction, as not within the jurisdiction of a Federal Court. He saw fit to consider them, and his answer to them is found in his opinion in *Manigault* v. *Ward,* 123 Fed. Rep., on p. 717, thus:

"Another objection to this Act is, that it is a local and special law, and in conflict with Sec. 34, Art. III., of the Constitution of the State. This section forbids local and special laws in ten particulars not applying to this case, and adds: 'In all other cases when a general law can be made applicable no special law shall be enacted.' The evils which this Act we are now considering sought to remedy are peculiar and exceptional. As far as the case discloses, Kinloch Creek runs through lands suitable for rice culture, and for that only. Consequently they are very low, easily flooded, subject to overflow by any abnormal tide or freshet. It is in close connection with Santee River. In that river, when any high tide is met by the descending stream, especially during a freshet, the water comes up into Kinloch Creek, and submerges all the adjacent fields. Thus, the crops sown there are constantly liable to overflow and destruction. To prevent this a freshet bank had been constructed on adjacent plantations, one end resting on

Santee River and passing over the lands of the defendants, which was intended to meet and counteract this influx of water. To make this freshet bank continuous and effective, it must cross Kinloch Creek. No general law could meet the evil, because the conditions are exceptional. The Act in question does not infringe this constitutional requirement."

The Eighth Assignment of Error.

Is the Act of Assembly of the State of South Carolina invalid because none of the pre-existing conditions for its consideration by the General Assembly required by Sections 31 and 34, Art. III., of the Civil Code of South Carolina, were fulfilled? (Transcript, fol. 38.)

This question is not a Federal question, and might well have been rejected by the Circuit Court as beyond its jurisdiction and a matter exclusively for the Courts of the State, but the Circuit Judge, on the plaintiff's motion for injunction, chose to consider it, and he has fully answered it in his opinion in *Manigault* v. *Ward et al.*, 123 Fed. Rep., on pp. 715, 716, 717, thus:

"In the case at bar there is no constitutional requirement which has been violated. The provisions of an Act of a preceding Legislature have not been followed in the matter of notice required by the Act. Does this make this Act invalid? The legislative power in South Carolina is vested in the General Assembly. Each General Assembly possesses all these powers, and is subject to no limitation not found in the Constitution. One Legislature, therefore, cannot control or enlarge the power of any succeeding Legislature unless, indeed, within its constitutional powers, a Legislature has entered into a contract with a third party. Such a contract is protected under the Constitution of the United States. When, therefore, one General Assembly passes an Act like this in question, declaring that no bill shall be introduced or entertained in either House of the General Assembly unless certain prerequisite conditions are fulfilled—conditions not existing in the Constitution—it assumes a power which it does not possess. If, notwithstanding, any succeeding General Assembly shall receive and entertain a bill which has not fulfilled these conditions, this action on its part is either a declaration of its independence of these restrictions, or it is a repeal of the previous Act, *pro tanto*. 'Acts of Parliament,' says Blackstone (1 Bl. Comm.,

90), 'derogating to the power of subsequent Parliaments bind not.' See, on this subject, Cooley on Constitutional Limitations (4th Edit.), p. 152 (*126), Note 3."

On all the points assigned, the Circuit Court committed no error in sustaining the demurrer to the bill of complaint, and the bill should be dismissed.

THEODORE G. BARKER,
For Defendants-Appellees.

Supreme Court of the United States.

No. 46.—October Term, 1905.

Arthur M. Manigault, Appellant, vs. Alfred A. Springs et al. } Appeal from the Circuit Court of the United States for the District of South Carolina.

[December 4, 1905.]

This was a bill in equity filed March 4, 1903, by Manigault to enjoin the damming or otherwise obstructing Kinloch Creek, in the county of Georgetown, South Carolina. A demurrer to the bill was sustained, and the bill subsequently dismissed. See 123 Fed. Rep. 708.

It seems that, in 1898, the plaintiff and the two defendants, Springs and Lachicotte, together with one Ford, were adjoining riparian owners on the Santee River, at the mouth of Kinloch Creek. The creek furnished access as a highway to all the proprietors on its banks. At that time the defendants constructed a dam across the creek for their own purposes. Objection was made to this by plaintiff and by Ford as an interference with their rights of passage and irrigation. Plaintiff also complained that the effect was to compel him to raise the dikes around his lands. As a result of long negotiations, a compromise was effected and a contract entered into in August, 1898, between defendants under the name of S. M. Ward & Company of the first part and plaintiff and Ford of the second part, whereby it was agreed that the obstructions should continue until December 31 of that year, when they should be removed, so as to give the parties complaining a clear passage through the creek.

This removal was effected and matters allowed to remain as they were until 1903, when the General Assembly of the State passed an act, reciting the necessity of draining the low lands on the Santee River, whereby their taxable value would be greatly enhanced. Authority was given to the defendants by name to erect and maintain a dam across Kinloch Creek, with a proviso that they should be liable for all such damages as might be established in any court of competent jurisdiction by any land owner claiming that his land had been damaged by reason of the erection of the dam.

Mr. Justice Brown delivered the opinion of the Court.

The gravamen of the bill is the alleged impairment by the statute of 1903 of the contract entered into in 1898, by which defendants agreed to

remove the dam then existing, and to allow such creek to remain open and unobstructed.

It was also charged that the Constitution of South Carolina declaring that all navigable waters should forever remain public highways was a privilege annexed to and constituting a part of the value of the lands, and that the damming of the creek, except for the purpose of the public health, welfare and safety and without due compensation therefor, was a destruction of the property of the plaintiff and a deprivation thereof without due process of law.

The specific injury complained of is that the plaintiff is the owner of a rice plantation on the North Santee River, bordering on Minim Creek, a tributary of the Santee, and lying in part just opposite the mouth or entrance of Kinloch Creek; that, relying on the agreement of the defendants, he had also purchased a millsite on the Santee, which could be used for a rice mill or a saw mill, the chief element of value of which was the water connection by means of a canal with Bluff Back Creek, accessible only through Kinloch Creek, and the consequent necessity of keeping Kinloch Creek open and unobstructed; that Kinloch Creek is a water highway, navigable by vessels into the Santee River and thence into the ocean; that the erection and retention of a dam across Kinloch Creek would not only interrupt his use of Kinloch Creek and Bluff Back Creek by preventing access to the public landing on the State road from his plantation on Kinloch Creek, but would obstruct the inflow of the tide of the Santee River through Minim Creek, causing the water from the river to flow back upon the banks to the plantation opposite the mouth of Kinloch Creek, and would thus compel him to raise and strengthen his banks.

1. The first question considered by the Court below was whether Kinloch Creek was a navigable water of the United States, as defined in the case of *The Montello*, (11 Wall. 411, 20 Wall. 430,) or navigable, as navigable streams are defined by the Constitution and the laws of South Carolina. The Court was of opinion, based apparently upon affidavits not sent up with the record, that the creek was not a navigable stream under these definitions.

But the bill alleges that "Kinloch Creek is a navigable stream or water highway," and the cause was determined upon demurrer to the bill, which admits the allegation of the bill that the creek was navigable. As an original proposition we have repeatedly held that, in the absence of legislation by Congress, a State has power to improve its lands and promote the general health by authorizing a dam to be built across its interior streams, though they were previously navigable to the sea by vessels engaged in the coastwise trade. This was decided in *Wilson* v. *Blackbird Marsh Creek Co.*, (2 Pet. 245,) in a brief but cogent opinion by Mr. Chief Justice

Marshall. An act of the State of Delaware gave the defendant the right to build a dam across the Blackbird Marsh Creek, the constitutionality of which act was attacked as an abridgment of the rights of those who had been accustomed to use it for the purposes of navigation. "But this abridgment," said the Court, (p. 251,) "unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this Court can take no cognizance." The act was sustained. See also *Pound* v. *Turck*, (95 U. S. 450;) *Gilman* v. *Philadelphia*, (3 Wall. 732;) *Huse* v. *Glover*, (119 U. S. 543.)

We do not think the provision of the Constitution of South Carolina interferes with these common law powers of the State over its navigable waters. In *Escanaba* v. *Chicago*, (107 U. S. 678, 688,) it was held that the right of bridging navigable streams extended to the State of Illinois, notwithstanding that the ordinance of 1787, for the government of the Northwest Territory, contained a clause declaring that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between them, shall be common highways and forever free." The power to span these rivers by bridges was put, partly upon the theory that the limitations upon the power of the State whilst in a territorial condition ceased to have any operative force except as voluntarily adopted by her after she became a State of the Union, and partly upon the theory, as said Mr. Justice Field, page 689, that "all highways, whether by land or water, are subject to such crossings as the public necessities and conveniences may require, and their character as such is not changed, if the crossings are allowed under reasonable conditions, and not so as to needlessly obstruct the use of the highways."

So also in *Cardwell* v. *Bridge Co.*, (113 U. S. 205,) a provision in the act admitting California, that "all the navigable waters within the said State shall be common highways and forever free," was held not to deprive the State of the power possessed by it to authorize the erection of bridges over navigable waters. Said the Court, page 211, "the clause, therefore, in the act admitting California, quoted above, upon which the complainant relies, must be considered, according to these decisions, as in no way impairing the power which the State could exercise over the subject if the clause had no existence." To the same effect, *Willamette Iron Bridge* v. *Hatch* (125 U. S. 1;) *Hamilton etc. R. R. Co.* v. *Vicksburg*, (119 U. S. 280, 284.)

In *Lake Shore etc. R. R. Co.* v. *Ohio*, (165 U. S. 65,) it was held that the act of September 19, 1890, conferring upon the Secretary of War the authority to direct the alteration of such bridges so as to render navigation easy and unobstructed, did not deprive the States of authority to bridge such streams.

While all of these cases turned upon the power of the State to authorize the erection of bridges, the same principle applies where the Legislature deems it necessary to the public welfare to make other improvements for the reclamation of swampy and overflowed lands, though certain individual proprietors may thereby be subjected to expense. The question whether Kinloch Creek could be obstructed without the permission of the Secretary of War does not arise in this case, and is specially disclaimed by the plaintiff. See *Lake Shore etc. Railroad Co.* v. *Ohio*, (165 U. S. 365;) *Leovy* v. *United States*, (177 U. S. 621, 633;) *Cummings* v. *Chicago*, (188 U. S. 410;) *Montgomery* v. *Portland*, (190 U. S. 89.)

The main argument was addressed to the question whether the contract of August, 1898, providing for the removal of the obstruction on December 31 and the free ingress and egress through the creek thereafter, was impaired by the act of the General Assembly of 1903, permitting the defendants by name to construct and maintain the dam in question.

It is the settled law of this Court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals. Familiar instances of this are, where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the State, prohibiting the establishment or continuance of such traffic;—in other words, that parties by entering into contracts may not estop the Legislature from enacting laws intended for the public good.

While this power is subject to limitations in certain cases, there is wide discretion on the part of the Legislature in determining what is and what is not necessary—a discretion which courts ordinarily will not interfere with. The leading case upon this point is that of *Charles River Bridge Co.* v. *Warren Bridge*, (11 Pet. 420,) in which a franchise to maintain a ferry between Cambridge and Boston, under which a bridge was subsequently erected, was held to be subject to the power of the Legislature to establish a parallel bridge between the same points. In *Stone* v. *Mississippi*, (101 U. S. 814,) a charter to a lottery company for twenty-five years was held to be subject to the power of the State to abolish lotteries altogether. Similar cases announcing the same principle are *Boyd* v. *Alabama*, (94 U. S. 645;) *Beer Company* v. *Massachusetts*, (97 U. S. 25;) *Butchers' Union Co.* v. *Crescent City*, (111 U. S. 746;) *New Orleans Gas Co.* v. *Louisiana Light*

Co., (115 U. S. 650, 672;) *Mugler* v. *Kansas*, (123 U. S. 623, 665;) *Chicago etc. R. R. Co.* v. *Chicago*, (166 U. S. 226.)

It only remains to consider, in connection with this branch of the case, whether the act of the General Assembly of 1903 was a proper exercise of the police power of the State. Of this we have no doubt. Although it was not an exercise of that power in its ordinarily accepted sense of protecting the health, lives and morals of the community, it is defensible in its broader meaning of providing for the general welfare of the people, by the reclamation of swampy, overflowed and infertile lands, and the erection of dams, levees and dikes for that purpose. We have often held that private interests are subservient to that right, except where property is taken for which compensation must be paid, and must give way to any general scheme for the reclamation or improvement of such lands.

Indeed, this seems to have been within the contemplation of Congress in its act of September 28, 1850, (9 Stat. 519,) to enable the States to reclaim the swamp lands within their limits, the first section of which enacts that "To enable the State of Arkansas to construct the necessary levees and dams to reclaim the swamps and overflowed lands therein, the whole of this swamp and overflowed lands made unfit thereby for cultivation . . . shall be, and the same are hereby, granted to said State." Section 4 extends this provision to the other States. Although the act has no direct bearing on this case, it recognizes an intent on the part of Congress to allow the States to regulate the disposal of overflowed lands, as the Legislature shall deem best for the public interests. That the act of the General Assembly in question was passed upon this theory is indicated by its recitals, that "by reason of the drainage and protection of said lands from overflow, their taxable value will be greatly enhanced, and without the dam provided for in this bill a large part of the land bordering on said creek will eventually become abandoned and valueless, as some portions of it now are," and that this "is the only feasible and practicable scheme for the drainage of said lands." This was the reason given for the passage of the act of the General Assembly of Delaware in the Blackbird Creek case, already cited. Chief Justice Marshall observed (p. 251): "The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the General Government, are undoubtedly within those which are reserved for the States." Several subsequent decisions have confirmed the power of the State to deal, in the absence of Congressional legislation, with their rivers, for the purposes of their internal improvement, such as *Withers* v. *Buckley*, (20 How. 84,) wherein the right of Mississippi to change the channels or courses of rivers within the State for the purpose of improve-

ment was sustained, and *Atkinson* v. *Philadelphia &c. R. R. Co.*, (2 Fed. Cases, 105, Case 615.) a decision by Mr. Justice Baldwin of this Court.

The whole subject was recently discussed in the case of *Leovy* v. *United States*, (177 U. S. 621,) wherein was vindicated the right of the State of Louisiana to authorize the construction and maintenance of levees, drains and other structures necessary and suitable to reclaim swamp and overflowed lands, although there was evidence that the stream there concerned (Red Pass) was useful for some minor purposes of interstate commerce. There was testimony that luggers or yawls chiefly used by fishermen to carry oysters to and from their beds sometimes went through this pass, but it was not shown that passengers ever went through it, or that freight destined for any other State was ever carried through it.

In delivering an exhaustive opinion in this case, Mr. Justice Shiras observed (p. 636): "We think that the trial Court might well take judicial notice that the public health is deeply concerned in the reclamation of swamp and overflowed lands. If there is any fact which may be supposed to be known by everybody, and, therefore, by Courts, it is that swamps and stagnant waters are the cause of malarial and malignant fevers, and that the police power is never more legitimately exercised than in removing such nuisances."

While, as already observed, there is a general allegation in the bill that Kinlock Creek was a navigable stream, and was capable of navigation by vessels in the Santee River and thence into the ocean, there is no allegation that it was ever used for that purpose, and the opinion of the Court was that it certainly was not a navigable water of the United States, or a public highway under the laws of South Carolina. But, however this may be, we are of opinion that the State had full power, in the absence of legislation by Congress, to authorize the construction of this dam for the avowed purposes of this act.

2. The second assignment of error, that the plaintiff was deprived of his property without compensation, and hence without due process of law, is also unsound.

The only allegation of the bill in that connection is that the construction of the dam was not only a destruction of plaintiff's right of navigation and of his access to his lands through Kinloch Creek, but has caused the water to fall back to some extent on the plantation on Minim Creek, just opposite the mouth of Kinloch, so as to compel the plaintiff to raise his dikes. We do not think the overflow to the minor extent indicated constitutes a taking of property within the meaning of the law, when the damage can be prevented by raising the banks, or that if the damage stated did in fact result, that it would justify the interposition of a court of equity.

The question whether the overflow of lands constitutes "a taking" within the constitutional provision has been discussed in several cases in

this Court. (*Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *Transportation Company* v. *Chicago*, 99 U. S. 635; *Gibson* v. *United States*, 166 U. S. 269; *Scranton* v. *Wheeler*, 179 U. S. 141; *Atwater* v. *Trustees*, 124 N. Y. 602.)

A recent case is that of *United States* v. *Lynah*, (188 U. S. 445,) wherein it was held that where the Government had placed dams and other obstructions in the Savannah River in such manner as to hinder its natural flow, and to raise the water so as to overflow plaintiff's lands and to cause a total destruction of their value, the proceeding must be regarded as an actual appropriation of the land, and created an obligation upon the Government to make compensation for the land. The case was distinguished from that of *Mills* v. *United States*, (46 Fed. Rep. 738,) wherein the damage consisted in obliging the plaintiff to raise the levees around his rice fields to prevent the flooding of the fields in high water. "Obviously," said the Court, in commenting upon that case, "there was no taking of plaintiff's lands, but simply an injury which could be remedied at an expense, as alleged, of $10,000, and the action was one to recover the amount of this consequential injury. The Court rightfully held that it could not be sustained." ~~The case of Mills is directly in point, and was decided by Mr. Justice Jackson, later of this Court.~~ A still more recent case is that of *Bedford* v. *United States*, (192 U. S. 217,) in which it is held that damages to lands by flooding as a result of revetments erected by the United States along the banks of the Mississippi River to prevent erosion of the banks from natural causes, are consequential and do not constitute a taking of the lands flooded within the meaning of the Constitution.

We think the rule to be gathered from these cases is that where there is a practical destruction, or material impairment of the value of plaintiff's lands, there is a taking, which demands compensation, but otherwise where as in this case plaintiff is merely put to some extra expense in warding off the consequences of the overflow.

The damage claimed by the plaintiff in the interruption of access to his lands and the impairment of his right to navigate the creek does not demand separate consideration. We have repeatedly held that where the Government of the United States has, for the purposes of improving the navigation of a river, erected piers or other structures by which access to plaintiff's land is rendered more difficult, there is no claim for compensation. (*Gibson* v. *United States*, 166 U. S. 269; *Scranton* v. *Wheeler*, 179 U. S. 141.) We see no reason why the same principle should not apply to cases where the State Legislature, exercising its police power, directs a certain dam to be built, and thereby incidentally impairs access to lands above the dam. In both cases the sovereign is exercising its constitutional right—in one case in improving the navigation of the river, and in the

other in draining its low lands, and thereby enhancing their value for agricultural purposes.

It is suggested that the agreement of 1903 created an easement of access to plaintiff's land, (*Ladd* v. *Boston*, 151 Mass. 585; *Hogan* v. *Barry*, 143 Mass. 538,) and that the statute of South Carolina must be construed as overriding private rights of property, and not merely as putting an end to the rights of the public, and as giving to plaintiff a claim for damages for the taking of that easement. But it does not necessarily follow that an injunction should issue. Apparently this covenant did not apply to the millsite, since this was purchased after the covenant was made, but, however this may be, a court of equity is not bound to enjoin a public work authorized by statute, until compensation is paid, where no property is directly appropriated. This is particularly true where the damage is difficult of ascertainment at the time and a reasonable provision is made by the law for compensation. (*Sweet* v. *Rechel*, 159 U. S. 380; *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557; *Cherokee Nation* v. *Kansas R. R. Co.*, 135 U. S. 641; *Beasley* v. *Texas & Pacific R. R. Co.*, 191 U. S. 492; *Haverhill Bridge Proprietors* v. *Essex County Commissioners*, 103 Mass. 120; *Parke* v. *Catholic Bishop*, 146 Ill. 158.) The State cases are numerous on this point.

In view of the incidental character of the damage probably resulting to plaintiff's land from the erection of this dam, and the careful provision of the act that the defendants shall be liable for such damage, we do not think, at least in the absence of an allegation that the defendants are financially irresponsible, that a court of equity would be authorized to enjoin the erection until the damages, which, if they exist at all, must be very difficult of ascertainment, shall be paid.

3. It is also assigned as error that the act of 1903 is obnoxious to the following provisions of the Constitution of South Carolina, Article III, Section 34, that "The General Assembly of the State shall not enact local or special laws concerning any of the following subjects, or for any of the following purposes, to wit: . . . II. To lay out, open, alter or work roads or highways."

As the case comes from a Federal Court, the question is properly before us.

Admitting that, for the purposes of transit and travel, a river may be considered a highway—and that seems to have been adjudged by the Supreme Court of South Carolina, (*Heyward* v. *Chisholm*, 11 Rich. 253,)—we think that, in connection with the words "To lay out, open, alter or work roads," the word "highway" is used in its ordinary sense, and as an equivalent to a public road. The power given by this section is evidently inapplicable to water highways, which are neither laid out, opened, altered or worked in the ordinary sense of these words.

4. It is also urged that the act was passed without the formality required by the Revised Statutes of South Carolina of 1893, in which it is declared that no bill for the granting of any privilege or immunity, or for any other private purpose whatsoever, shall be introduced or entertained in either house of the General Assembly except by petition, to be signed by the persons desiring such privileges, of which sixty days' notice shall be given to all persons interested, and be published in the newspaper having the largest circulation in the county where such privilege is to be enjoyed, once a week for three weeks, etc.

As this is not a constitutional provision, but a general law enacted by the Legislature, it may be repealed, amended or disregarded by the Legislature which enacted it. This law was doubtless intended as a guide to persons desiring to petition the Legislature for special privileges, and it would be a good answer to any petition for the granting of such privileges that the required notice had not been given; but it is not binding upon any subsequent Legislature, nor does a non-compliance with it impair or nullify the provisions of an act passed without the requirement of such notice.

There was no error in the action of the Court below, and its judgment is, therefore,

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.